89-862

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SYBIL YOUNG and RODERICK YOUNG,
Petitioners,

vs.

UNITED STATES DEPARTMENT OF JUSTICE,
Respondent.

SYBIL YOUNG and RODERICK YOUNG,
Petitioners,

vs.

CHEMICAL BANK, N.A.,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. The Right to Financial Privacy Act, 12 U.S.C. §3401 *et seq.* (the "Act"), provides in §3402 that, subject to enumerated exceptions, no federal department or any of its employees may "have access to or obtain copies of, or the information contained in" customer records from a financial institution, including any office of a bank located in any state, unless certain conditions are met. Section 3403 of the Act provides that "no financial institution . . . may provide to [any federal department or employee of a federal department] access to or copies of, or the information contained in, financial records of any customer except in accordance with the provisions of the [Act]".

Does the Act *not* apply to the United States Department of Justice (the "Department") or a bank when the Department obtains from the bank, and the bank provides to the Department, customer information pursuant to 28 U.S.C. §1782(a) in furtherance of a request for assistance from a foreign government, even though none of the enumerated exceptions in the Act exempts the Department or the bank from the Act's coverage under these circumstances?

2. If the Act does not apply in the circumstances described in Issue 1, does it nonetheless apply when, in addition to seeking the customer information for the foreign government, the Department seeks such information for its own purposes, or reserves the right to review and use such information for its own purposes, or actually uses such information for its own purposes?

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UNITED STATES DEPARTMENT OF JUSTICE,

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SYBIL YOUNG AND RODERICK YOUNG,

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-vs-

CHEMICAL BANK, N.A.,

Respondent.

Sybil Young and Roderick Young hereby petition this Court to issue writs of certiorari to the United States Court of Appeals for the Second Circuit in respect of the above-captioned actions.[1]

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[1] Petitioners brought two separate actions in the United States District Court for the Southern District of New York. Both actions concerned the transaction which is the subject of this petition -- the acquisition by the

(Footnote continued)

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 882 F.2d 633 (2nd Cir. 1989) and reprinted in the appendix hereto. (A. 1-27) The opinions of the District Court were not published but are reprinted in the appendix. (A. 28-40,42-55)

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1). The Court of Appeals issued its original opinion and judgment on August 8, 1989. On August 30, 1989, it issued an order amending such opinion and denying petitioners' timely petition for rehearing.

STATUTES RELATING TO THE CASES

This case involves the Right to Financial Privacy Act, 12 U.S.C. §3401 et seq. (the "Privacy Act" or the "Act"), which was enacted in 1978 and has never been the subject of an opinion of this Court.

United States Department of Justice (the "Department") from Chemical Bank ("Chemical") of information and records concerning accounts maintained at Chemical by petitioner Sybil Young. In such actions petitioners alleged that the Department's acquisition, and Chemical's delivery, of such records and information constituted violations of the Right to Financial Privacy Act, 12 U.S.C. §3401 et seq. (the "Privacy Act" or the "Act"). The District Court dismissed the actions on preliminary motions in separate opinions which cross-reference each other. The Court of Appeals affirmed the dismissal of petitioners' federal claims in a single opinion. The issues for which review is sought are the same in each case: whether the safeguards of the Privacy Act apply when an employee of a federal department seeks under 28 U.S.C. §1782 to obtain individual customer account records from a domestic bank for use in a foreign investigation, either (i) exclusively for the use of such foreign government or (ii) for use by the foreign government and the possible or actual use by the federal department. Since the issues in each case are the same, petitioners have combined their applications for writs of certiorari in a single petition.

The Privacy Act contains prohibitions, limitations and standards applicable to United States departments and agencies, and their officers, employees and agents (severally defined in §3401(3) of the Act as "Government authority" and herein referred to as the "Government"), with respect to the Government's obtaining individual customer records and information from domestic banks and other domestic financial institutions. The Privacy Act also contains prohibitions, limitations and standards applicable to domestic financial institutions in their delivery of such records and information to the Government.

Section 3402 provides in pertinent part as follows:

> Except as provided by section 3403(c) or (d), 3413, or 3414 of this title, no Government authority may have access to or obtain copies of, or the information contained in the financial records of any customer from a financial institution unless the financial records are reasonably described and

the customer has either authorized the disclosure or the disclosure is made in response to an administrative subpoena or summons, search warrant, judicial subpoena or formal written request meeting the criteria specified in §§3404 through 3408 of the Act.

Section 3403 of the Act provides in pertinent part as follows:

> (a) No financial institution . . . may provide to any Government authority access to or copies of, or the information contained in, financial records of any customer except in accordance with the provisions of this chapter.
>
> (b) A financial institution shall not release the financial records of a customer until the Government authority seeking such records certifies in writing to

> the financial institution that it has complied with the applicable provisions of this chapter.

Sections 3404 through 3408, in addition to providing criteria for administrative subpoenas and summonses, search warrants, judicial subpoenas and formal written requests, provide that when the Government seeks to obtain from a bank any records or information relating to an individual customer of the bank, the Government must give the customer advance written notice. Section 3409 permits such notice to be delayed under specified circumstances, by order of a district court.

The Privacy Act is reprinted in full in the appendix. (A. 61)

The instant cases also involve 28 U.S.C. §1782 which provides that a district court may issue an order compelling the giving of testimony or the production of documents for use in foreign tribunals. Such statute, which is procedural in nature, is also reprinted in the appendix. (A. 94)

STATEMENT OF THE CASES

Petitioner Sybil Young, a citizen of Great Britain, and her husband, petitioner Roderick Young, a citizen of Bermuda, have been engaged for many years in the business of renting motor bicycles and in other businesses in Bermuda. In 1981 and 1984, Mrs. Young, who frequently travelled to the United States, opened deposit accounts at a New York City branch of Chemical. Between 1981 and 1986, Mrs. Young made a number of deposits to and withdrawals from these accounts. (JA. 88,152,177)[2]

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[2] Numbers in parentheses preceded by "JA." are references to pages in the joint appendix filed by petitioners and Chemical in the Court of Appeals. All of the cited pages were incorporated by reference in the joint appendix filed in the Court of Appeals by petitioner and the Department.

Sometime in 1986 the Office of Bermuda Attorney General Sol Froomkin initiated an investigation into whether the Youngs had violated Bermuda's foreign currency exchange control regulations by taking United States currency and travellers' checks out of Bermuda without permission from Bermuda's Controller of Foreign Currency. The investigation was allegedly instigated by a tip from an unidentified informant, believed by petitioners to be an employee of Chemical, who apparently indicated to Froomkin's office that the Youngs might have one or more accounts with a Chemical branch in New York City. (JA. 114,121)

Acting on this tip, Froomkin's office contacted Chemical and asked it for records and information concerning any accounts maintained by the Youngs. Chemical responded that it would make any such records available, provided Froomkin supplied an appropriate subpoena. (JA. 114-115)

At this point, rather than apply for a subpoena himself, Froomkin turned for assistance to the Department.[3] Sometime in October or November, 1986, he telephoned the office of the United States Attorney for the Southern District of New York and was directed to Executive Assistant U.S. Attorney David Denton in that office. (JA. 114-115) After discussing the Young investigation with Denton, Froomkin provided Denton with a letter, which Denton received in early January 1987, stating that the evidence which Froomkin desired the Department to procure was for use in an investigation, but that if Froomkin were in the future to obtain enough evidence to justify a prosecution, the evidence would be used in such a prosecution. (JA. 121-122)

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[3] Before contacting the Department, Froomkin ascertained that under Bermuda law he would not be able to obtain from a Bermuda court a letter rogatory for the documents and information he sought from Chemical. (JA. 121)

Denton proceeded to draft and file in the District Court for the Southern District of New York an ex parte application pursuant to 28 U.S.C. §1782, requesting that he be appointed a commissioner for the purpose of taking testimony and obtaining evidence in accordance with a request for international judicial assistance made by the Attorney General of Bermuda. Denton made the application on behalf of the United States in Denton's capacity as an Assistant United States Attorney. On January 28, 1987, the District Court signed the form of order that Denton had presented in connection with the application. (JA. 116,124-128) The order, in the first decretal paragraph, appointed Denton as commissioner and authorized him, among other things, to obtain testimony and other evidence in conformity with Froomkin's request. The second decretal paragraph provided:

> that the testimony or other evidence received in accordance with this Order are to be retained by the United States Department of Justice for such use as the Attorney General or his designated representatives may deem appropriate.

On or about January 29, 1987, Denton submitted another ex parte application to the District Court, seeking: (1) a court-ordered subpoena duces tecum requiring Chemical to produce to Denton "[a]ny and all records of whatever nature pertaining in any way to accounts maintained at Chemical Bank by Roderick Young and/or Sybil Young"; (2) an order permitting the Depar ment to delay for up to 90 days the notification to the Youngs of its intended acquisition of their bank records; and (3) an order restraining Chemical indefinitely from disclosing to anyone the existence of the subpoena or the fact that Chemical expected to produce or had produced any of the Youngs' records to the Department. (JA. 117,129-130) The form of the subpoena and orders which Denton requested the District Court to issue were appended to Denton's application and signed by the District Court on January 29, 1987.

Denton's ex parte requests for the delayed-notice order and restraining order were made in response to Froomkin's desire

for secrecy. On January 28 or 29, 1987, on or about the date upon which Denton was appointed by the District Court as a commissioner, Denton telephoned John O'Flaherty, a bank officer at Chemical with whom Froomkin had been communicating. Denton informed O'Flaherty that the Department was intervening in the Young investigation on Froomkin's behalf, and that the Department intended to obtain a commission and to subpoena the Youngs' account records from Chemical. O'Flaherty mentioned to Denton that ordinarily Chemical would disclose a request such as Denton's to the customer whose records were sought, unless Chemical received a court order restraining it from giving such notice. (JA. 116-117) When Denton discussed Chemical's notification policy with Froomkin, Froomkin advised Denton that notification to the Youngs concerning the Department's document request would "interfere with" and "severely impede" the investigation, which was "still preliminary". (JA. 117,130) Denton therefore requested the delayed-notice order and restraining order. (JA. 117,129-130)

In his application for the delayed-notice order and restraining order, Denton cited §3409 of the Act as the legal basis for such orders.[4] (JA. 130)

On February 4, 1987, O'Flaherty came to Denton's office and delivered to Denton all copies of Chemical's records relating to the Youngs, which Chemical had made to that point. The documents consisted of account application forms, cancelled checks and monthly account statements for the period March 1984 through August 1986, relating to an account in

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[4] In fact, §3409 of the Act is addressed only to exempting the Government from compliance with the advance customer notification provisions of the Act. It provides no authority for an order restraining a bank from notifying its customer that the bank's records relating to such customer are being sought by the Government. The Court of Appeals did not reach the issue of whether the Act provides a basis for such a restraining order. It noted that the issue was "not a trivial one" and expressly left the resolution of such issue to another day. (A. 16)

Mrs. Young's name. (JA. 131) Denton assertedly gave O'Flaherty a copy of the subpoena at the time O'Flaherty delivered the copies to Denton. (JA. 118) Denton reviewed the records O'Flaherty had given him, telephoned Froomkin to let him know what the Department had procured, and mailed copies of the documents to Froomkin the same day. (JA. 131-132)

Although there is nothing in the record to suggest that Denton, an Assistant United States Attorney, had any evidence, or any information, that either of the Youngs had violated a United States law, Denton also retained one set of copies of such documents in a file, just as the District Court's January 28, 1987 order which he drafted required him to do, "for such use as the [United States] Attorney General or his designated representative may deem appropriate." (JA. 119)[5]

During the next two months, Denton engaged in continuing conversations with Chemical personnel, seeking additional bank records for use in the investigation of the Youngs. On April 8, 1987, Chemical released to Denton additional documents relating to the Youngs, pursuant to Denton's request. As with the documents he had obtained in February, Denton sent one set of copies to Froomkin and kept one set for the Department's files. (JA. 118,119,133)

On April 21, 1987, Denton in his capacity as Executive Assistant United States Attorney, wrote a letter to Chemical's legal department, on Department letterhead, in which he noted that the Department had agreed to assist Froomkin in the Young investigation and said that any assistance Chemical would give investigators from Froomkin's office in connection with the Young investigation would be appreciated by the Department. (JA. 118, 135) As a result, Chemical arranged for its employees to speak informally to Froomkin's representatives

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[5] The Court of Appeals confirmed that the record reveals no violations of United States law by the Youngs. (A. 18)

about the Youngs' transactions at Chemical and Mrs. Young's accounts and to sign written statements with respect thereto, although no subpoena had ever been issued for such representatives' testimony. (JA. 118,147-173)

On May 20, 1987, Roderick Young was arrested in Bermuda. At that time Sybil Young was not in Bermuda. (JA. 143)

On August 13, 1987 an indictment charging the Youngs with 47 counts of violating Bermuda's currency control laws was filed in the Supreme Court of Bermuda. (JA. 12) On August 25, 1987, the Youngs pleaded guilty to almost all counts and were sentenced to up to two years imprisonment on each of the convictions, or, in the alternative, to pay fines in the amount of more than $745,000 (for Sybil) and of $184,500 (for Roderick). (JA. 13)

According to D. Schofield, an attorney in the Office of the Bermuda Attorney General, the documents obtained from Chemical pursuant to the request for assistance were used by the office of the Attorney General of Bermuda "as an essential part of the evidence in the criminal case against the Youngs." (JA. 13)

Neither of the Youngs ever authorized Chemical to release or disclose any information concerning Sybil's accounts to the Department. (JA. 92,188)

Although the delayed-notice order obtained by the Department provided that the Government would delay up to 90 days its obligation to give the Youngs the notice required by the Act, after the 90-day delay period elapsed the Government did not give the Youngs any notice. Indeed, neither of the Youngs ever received, at any time prior to their convictions, any notice that Denton was seeking access to records and information concerning the accounts maintained by the Youngs at Chemical, that Chemical intended to disclose such records and information to Denton, or that Chemical actually disclosed such records and information to Denton. (JA. 93-94,189).

On November 12, 1987, after paying the fines, the Youngs commenced an action against Chemical for violations of §3403 of the Privacy Act, and on November 20, 1987, they commenced an action against the Department for violations of §3402 of the Act. Jurisdiction in both actions was based on 12 U.S.C. §3416.

The District Court dismissed the Youngs' claims on preliminary motions, holding, *inter alia*, that the Privacy Act does not apply when an employee of a federal department obtains financial information from a bank while acting as a commissioner under an order issued by a district court in response to a request for assistance pursuant to 28 U.S.C. §1782(a) and when, as the Department asserted and the District Court found to be the facts in these cases, the Department does not obtain such documents in furtherance of an investigation of its own. According to the District Court, the purpose of the Act (and inferentially the intent of Congress) is to restrict the Government's access to customer records for use in investigations conducted by the United States; therefore, when (as the District Court determined) the Government is acting merely as a "conduit" for the receipt and transmission of information and is not acting in furtherance of an investigation of the United States, the Act does not apply. According to the District Court, an employee of a federal department who acts as a commissioner under 28 U.S.C. §1782 does not act in his capacity as an employee of the department but as a representative of the foreign tribunal which requested assistance and, accordingly, it is the foreign tribunal which requested assistance and has "access to" or "obtains" the financial records within the meaning of §3402 of the Act.[6]

On appeal, the Court of Appeals affirmed the dismissal of the Youngs' claims under the Privacy Act, holding, as did the

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[6] The District Court also dismissed the petitioners' claims on alternative grounds which the Court of Appeals did not reach.

District Court, that the Privacy Act does not apply when an employee of a federal department obtains individual customer account records from a financial institution pursuant to a court-ordered subpoena while acting as a court-appointed commissioner. (JA. 13) However, the Court of Appeals followed a different line of reasoning, which had not been urged by any of the parties and was never briefed. It based its holding on findings that Congress did not intend the Act to apply where, as it determined to be the case here, "adequate controls" on the Government's obtaining of individual customer information from financial institutions already existed. (JA. 9) Such holding, it said, furthered Congress's goal of encouraging financial institutions to cooperate voluntarily with law enforcement agencies and its goal of encouraging foreign governments to seek the assistance of the Government in their investigations so as to stimulate reciprocal assistance for the Government's own investigations. (JA. 9-11) The Court of Appeals did not address the issue of whether the Act nonetheless applies when the Government, although seeking or obtaining customer information from a financial institution for a foreign government, also seeks the information for its own purposes, or reserves the right to review and use the information for its own purposes, or actually uses the information for its own purposes.

REASONS FOR GRANTING THE WRITS

1. *The Court of Appeals Clearly Erred*

The first reason the Court should issue writs of certiorari is that the Court of Appeals , when it determined that the Privacy Act does not apply to the facts of these cases, erroneously decided an important question of federal law that should be settled by this Court. Congress enacted the Privacy Act in 1978 to regulate the Government's access to bank records of individuals. The Act was a response to *United States v. Miller*, 425 U.S. 435 (1976), in which this Court had decided that a bank's records relating to an individual depositor were the bank's own property and that the Fourth Amendment did not give a depositor any standing to challenge the federal

government's access to, or use of, such records. The driving force behind the enactment of the Privacy Act was Congress's desire to provide individuals with appropriate safeguards against the federal government's abusing its power to obtain such records. As the Department's representative, Assistant Attorney General Benjamin Civiletti, testified in a Senate subcommittee hearing:

> [I]t's the rights of the citizens which we are protecting. It's not the abuses so much. It's the risk of abuse. And every agency of government, just like all humans, have failings and it seems to me that the rights and the evil to be protected against is one also of future abuse as well as past abuse.[7]

The safeguards ultimately adopted by Congress in the Privacy Act include the requirement that the Government "reasonably describe" the records it seeks (Privacy Act, §3402) and, in cases where the Government seeks information by subpoena, that the subpoena be "authorized by law", that the Government have reason to believe that the information sought is relevant to a legitimate law enforcement inquiry, and, except in certain limited circumstances, that the customer have advance notice of the Government's effort to obtain the records and an opportunity to challenge such effort. Privacy Act, §3407. Although there are numerous express exceptions to the applicability of the Act, petitioners submit that none of such exceptions applies to the facts of these cases. The Court of Appeals nonetheless held that the Act does not apply to the facts of these cases, basing its decision on a finding that Congress intended that the Act should not apply to such facts. It made such finding despite its honest acknowledgments that

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[7] Record of Hearings before the Senate Subcommittee on Financial Institutions of the Committee on Banking, Housing and Urban Affairs on S.2096, S.2293 and S.1460, April 18 and 20 and May 17, 1978, p. 258. S.2096, S.2293 and S.1460 were very much like the House of Representatives bill that Congress ultimately enacted.

"Congress never considered the question before us when it enacted the [Act]" and that "the Act does not contain a single reference to commissioners or letters rogatory, and nothing in the legislative history suggests that Congress weighed the possible impact of the Act on either of these procedures." (A. 7)

The Supreme Court should issue writs of certiorari so that the propriety of the Court of Appeals' decision creating a judicial exception to the applicability of the Privacy Act may be examined. In the opinion of petitioners, such decision does not implement, but disregards, Congress's intentions in enacting the Privacy Act, is clearly erroneous, and should be reversed.

2. *The Court of Appeals' Decision Conflicts with the Decision of Another Federal Court of Appeals*

The Court should also issue writs of certiorari so that the split of authority between the Courts of Appeals for the Second and Eleventh Circuits may be resolved. In *In Re Request For Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151, 1156 n.12 (11th Cir. 1988), cert. denied, 109 S.Ct. 784 (1989), the Court of Appeals for the Eleventh Circuit affirmed the denial of an individual's motion to quash a judicial subpoena commanding a bank to release the individual's bank records to the Department, stating:

> The records will be released in conformance with the Right to Financial Privacy Act, 12 U.S.C. § 3401-22 (1982).

See also *In Re Request for International Judicial Assistance (Letter Rogatory) from the Federal Republic of Brazil*, 700 F. Supp. 723 (S.D.N.Y. 1988), decided prior to the Court of Appeals' decision in these actions, in which the District Court expressly followed the lead of the Eleventh Circuit and required the Department to comply with the Privacy Act, saying:

> [T]he broad definitions of that statute [the Privacy Act], §3401, seem by their plain meaning to apply,

and Congress clearly attached public policy significance to the confidentiality of deposits in American banks. Id. at 725-726.

3. *The Issues Are Important to Many People and Governments*

The Court should also issue writs of certiorari because the questions raised by this petition are important not only to petitioners but to thousands of other individuals whose privacy rights are threatened. The Department's involvement on behalf of the Bermuda prosecutor in these actions, far from being unique, is typical of the Department's routine practice of actively involving itself in investigations carried on by foreign prosecutors within the United States. On page 26 of its brief in the Court of Appeals, the Department said: "In the interests of comity, . . . the Department of Justice routinely applies to the District Courts at the request of foreign governments, seeking the appointment of its employees as Commissioners under letters rogatory." Indeed, on pages 16 and 17 of such brief, the Department asserted that it is involved in hundreds of cases each year in which it obtains documents and evidence on behalf of foreign prosecutors. The Court of Appeals acknowledged that requests by foreign governments to domestic law enforcement officials for assistance in criminal matters are "typical". (A. 6)

4. *The Petitioners' Position*

It is petitioners' position that when the Government seeks individual customer account information from a domestic financial institution for the purpose of furthering an investigation by a foreign government, the Government is obliged to observe the basic safeguards provided by the Privacy Act unless the Act expressly provides otherwise. Although those safeguards vary to some extent depending upon the particular method which the Government may select in its effort to obtain the information it seeks, when a judicial subpoena is used the safeguards are those set forth in §§3402, 3403, 3407 and 3409 of the Act, as follows:

(1) the subpoena must "reasonably describe" the records it seeks (§3402);

(2) the subpoena must be "authorized by law" (§3407(1));

(3) the Government, before it can obtain the subpoena, must have reason to believe that the information sought is relevant to a legitimate law enforcement inquiry (§3407(1));

(4) unless the Government obtains a delayed-notice order, it must, at or before the time it serves the subpoena on the financial institution, serve on, or mail to, the customer a copy of the subpoena and a notice in the form prescribed by the Act, alerting the customer of his or her right to challenge the subpoena (§3407(2));

(5) if the Government seeks a delayed-notice order, it must submit to the district court issuing the subpoena allegations of fact, with reasonable specificity, demonstrating reason to believe that service of a copy of the subpoena on the customer will endanger the life or physical well-being of any person, or will result in flight from prosecution, destruction or tampering with evidence or intimidation of potential witnesses, or will otherwise seriously jeopardize an investigation or official proceeding or cause undue delay in an ongoing official proceeding (§3409); and

(6) the Government, before obtaining the subpoenaed documents from the financial institution, must provide the institution with a written certification that the Government has complied with all applicable provisions of the Privacy Act (§3403).

In the petitioners' view, it is obvious from the plain language of the Act that the Act is applicable to the Government's obtaining of records and information in furtherance of foreign investigations. Congress plainly said in §3402 of the Act that, except as provided in the Act, "no Government authority may have access to or obtain copies of, or the information contained in the financial records of any customer from a financial institution unless the financial records are reasonably described" and certain other conditions are met. The exceptions to the applicability of the Act, set forth in §§3403, 3413 and 3414 of the Act, are numerous, specific and cover a broad range of governmental functions. Congress did not include in this lengthy list of exceptions any exception which permits the Government to ignore the Act's safeguards when it seeks to compel disclosure of customer account information for use in furtherance of a foreign investigation.

It is also the petitioners' view that, even if the Act normally would not apply to the Government's obtaining individual customer account information from a bank in furtherance of a foreign investigation, it applies when, as occurred here, the Government expressly reserves the right to review and use such information for its own purposes and when, as petitioners contend occurred here, the Government actually seeks and uses such information for its own purposes. (It should be noted that even the Department has acknowledged that, if the Department sought the records and information for its own purposes, the Act would apply. On pages 7 and 8 of its memorandum of law, dated February 8, 1988, the Department referred the District Court to §3401(3) of the Act, which defines "Government authority" to include any "agency" or "department" of the United States, and said that "[T]he Department of Justice would certainly be subject to this provision if it sought records on its own behalf....")

The Court of Appeals, after noting "that Congress never considered the question before us when it enacted the [Privacy Act]" (A.7), nevertheless determined that the Government should be excused from complying with the Act's safeguards when it procures individual customer account information

through a court-appointed commissioner using a court-ordered subpoena. It made such determination without addressing the issue of whether the Government should be so excused when it seeks bank records relating to a customer for its own purposes, or reserves the right to review and use the information for its own purposes, or actually uses the information for its own purposes.

In making the determination that the Act does not apply under the circumstances of these cases, the Court of Appeals created an implied exception to the scope of the Act and thereby ran afoul of the basic principle, often stated by this Court, that when Congress has specifically listed in a prohibitory statute the exceptions it has chosen to recognize, the courts may not imply additional exceptions in the absence of evidence clearly demonstrating Congress' intent that the additional exceptions exist:

> Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.

Andrus v. Glover Constr. Co., 446 U.S. 608, 616-617 (1980). Alternatively phrased:

> Exceptions to clearly delineated statutes will be implied only where essential to prevent "absurd results" or consequences obviously at variance with the policy of the enactment as a whole.

United States v. Rutherford, 442 U.S. 544, 552 (1979), quoting *Helvering v. Hammel*, 311 U.S. 504, 510-511 (1941).

5. *The Court of Appeals' Principal Rationale*

The Court of Appeals' principal rationale was that an exemption from the Act should be implied whenever a procedure used by the Government in obtaining individual

customer records from financial institutions is subject to other "adequate controls". (A.9) Such determination was based on the premise, gleaned from the applicable House Report,[8] that Congress had exempted grand jury subpoenas from the Act "after [Congress] decided the safeguards already in place [with respect to grand jury subpoenas] would adequately protect against abuse." (A. 8) From this premise, the Court of Appeals concluded that Congress intended that, whenever there are adequate safeguards (*i.e.*, "adequate controls") already in place to protect against Government abuse, the Act does not apply. However, such reasoning is flawed in several respects. The premise is faulty and the conclusion disregards the plain wording of the Act and Congress's manifest intent in adopting it. If such reasoning were followed to its logical conclusion in practically every context in which the Act by its terms applies, the Act would be a nullity.

In point of fact, the House Report does not say that Congress exempted grand jury subpoenas from the Act because of the existence of other safeguards. As the House Report makes clear, Congress exempted grand jury subpoenas from the Act for numerous reasons, of which the existence of an already existing safeguard, judicial scrutiny, was but one. The reasons stated in the House Report for not applying the restrictions and safeguards of the Act to grand jury subpoenas are as follows:

> (1) the grand jury is "the single most important investigative tool of criminal law enforcement" and, therefore, grand jury subpoenas should not be subject to any restrictions;
>
> (2) any restrictions on the use of grand jury subpoenas should be deferred until such restrictions may be considered in the context of legislation

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[8] Report of the House Committee on Banking, Finance and Urban Affairs, 95-1383 ("House Report"), at 35 and 228.

specifically addressed to overall reforms of the grand jury system;

(3) decisions of this Court suggest that legislation which might impose burdensome delays on the grand jury would be subject to constitutional attack;

(4) expanded notice and challenge rights with regard to grand jury subpoenas might diminish grand jury scrutiny and threaten the privacy of the individuals being investigated; and

(5) grand jury subpoenas are already subject to judicial scrutiny.

With respect to reason (5) there was less consensus than on other points. The House Report expressly notes that a number of members on the committee which issued the House Report felt that existing judicial review had *not* been adequate to curb abuses of grand jury subpoenas. H. Rep. 95-1383, at 35.

Moreover, there is nothing in the House Report to suggest that, just because grand jury subpoenas are subject to a pre-existing "adequate control" (judicial review), Congress intended that all court-ordered judicial subpoenas issued at the behest of Government employees acting as court-appointed commissioners should be exempt from the Act. The Act is expressly applicable to administrative summonses and subpoenas and to judicial subpoenas, all of which are routinely subject to judicial review before and/or after issuance. The Act is also expressly applicable to search warrants which, like the court-ordered subpoena in these cases, are subject to judicial scrutiny before, as well as after, issuance. Search warrants may not issue until after an independent magistrate or judge determines that there is probable cause to believe that the records sought contain evidence of a crime, that the warrant is not overly broad, and that the records sought are described with sufficient particularity. Rule 17, Federal Rules of Criminal Procedure. Once issued, search warrants are subject to motions to quash. If the occurrence of prior judicial scrutiny

and the availability of subsequent judicial review of a judicial subpoena issued pursuant to 28 U.S.C. §1782 constitute, in and of themselves, pre-existing "adequate controls" which justify an implied exception to the Act, then all search warrants are exempt from the Act. Indeed, if the mere availability of subsequent judicial review were determinative of the issue of whether an investigative procedure employed by the Government were subject to the Act, the Act would not apply to any judicial subpoenas, search warrants, or investigative summonses or subpoenas, for all of them are routinely subject to subsequent judicial review.[9]

In light of the foregoing, the Court of Appeals, without saying as much and without explaining why, obviously placed dispositive weight on the fact that the Government employee who obtained the documents (Denton) was a commissioner appointed by the District Court. (*See* Court of Appeals opinion, fn. 2) (A. 9) In doing so, the Court of Appeals clearly erred. The status of an individual as a court-appointed commissioner is irrelevant under the Act. There is nothing in

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[9] The Court of Appeals' suggestion that the subpoena "so ordered" by the District Court in these cases received prior judicial scrutiny and therefore was subject to even greater controls than a grand jury subpoena which does not receive prior judicial scrutiny is misleading. The target of a grand jury subpoena receives important protections under the Act which are not available to the target of a judicial subpoena issued under 28 U.S.C. §1782. Under §3420 of the Act, financial records about a customer, obtained by grand jury subpoena, are subject to limitations on use and must be destroyed or returned to the financial institution if not used for a purpose specified in §3420. By contrast, there is no statutory limitation on the Government's use of documents obtained pursuant to a subpoena issued under authority of 28 U.S.C. §1782 if the Act does not apply. If the Act does not apply, such documents may be used by the Government for any purpose, even though the Government's stated purpose for obtaining the documents is to assist in the investigation of a foreign government. The Government's ability to use such documents for whatever purposes it deems appropriate -- without any limitation whatever -- clearly show that the views of Congress with respect to grand jury subpoenas are not an appropriate indication of what Congress intended the law to be with respect to subpoenas other than grand jury subpoenas.

the Act which states or suggests that the particular function which an employee of a federal department or agency performs, or the particular manner in which he is designated to perform that function, or the particular status which such employee enjoys (ambassador, trustee, special prosecutor, commissioner), is relevant to the issue of whether the Act applies to him when he seeks access to the financial records of a bank customer. The main purpose of the Act is to enhance the right of natural persons to be free from unwarranted intrusions into their privacy by the Government, and such purpose is not subserved by an approach which completely disregards a person's status as an employee of a federal department or agency when such person seeks records from a bank. This is especially true when, as here, the person is in all relevant matters acting as an advocate for the Government at the same time that he is acting as a representative of a foreign government. When, as here, a court-appointed commissioner, in performing the functions relating to his commission, uses the office of a federal department, uses the letterhead of such department, and consistently characterizes himself as an agent of such department, he should be regarded as a federal employee for all the purposes of the Act. In the real world a federal prosecutor -- by training, outlook and devotion to duty -- is a prosecutor whether he seeks access to a customer's bank statements and cancelled checks for a federal department in his capacity as an employee of that department or whether he seeks access for a foreign government in his capacity as a commissioner.

Indeed, the irrelevancy of Denton's status as a commissioner for purposes of the Act is indicated by the record, which clearly shows that Denton, while acting as a commissioner, was acting in furtherance of the law enforcement interests of the United States. The January 28, 1989 order which Denton signed in his capacity as an Assistant United States Attorney provided that copies of the records he would receive from Chemical should "be retained by the United States Department of Justice for such use as the Attorney General or his designated representative may deem appropriate". Denton actually retains copies of such records in

a file in his office. Neither Denton nor anyone else has averred that the Department never had any interest in such documents, or that no one in the Department ever read such documents with a view to determining whether the Youngs had violated any United States law. Under all the circumstances, it is fair to conclude that the Department was interested in making its own informal investigation of the Youngs. The documents it retained, unlike documents obtained pursuant to a grand jury subpoena, could have been (and may still be) used by the Department for any purpose.

Finally, even if the mechanics for the Government's utilization of 28 U.S.C. §1782 provide a district court with a modicum of control over the Government's access to documents under that statute, such control is hardly "adequate". 28 U.S.C. §1782 does not require a court to direct the Government not to read any documents obtained by the Government as a result of the Government's utilization of such statute, nor does it require the Government to limit its use of any documents or other information so obtained. More importantly, such statute does not provide for stiff financial penalties to be imposed on a federal department which uses such documents or information for its own purposes or transfers them to another department so that the other department may use them.

For all the reasons set forth above, the Court of Appeals' principal ground for determining that the Act does not apply to the facts of these cases -- that pre-existing "adequate controls" existed -- has no merit.

6. *The Court of Appeals' Supporting Rationales*

The Court of Appeals' second ground for implying the existence of a further exception to the Act--the supposed intent of Congress, in passing the Act, to encourage voluntary disclosure by banks of information about their customers--is also lacking in merit. As evidence of this supposed intent, the Court of Appeals cited one of the exceptions contained in §3403 of the Act. Section 3403 generally prohibits a financial

institution from disclosing information about its customers' accounts to the Government unless the Government has delivered to the institution a certificate stating that the Government has complied with the Act. Under the exception set forth in §3403(c) of the Act, referred to by the Court of Appeals, if a bank believes that one of its customers is using his account to commit a crime, the bank may disclose to the Government, without complying with the Act, the identity of the account and the nature of the suspected illegal activity. That is all the bank may disclose to the Government unless the Government delivers the aforementioned certificate to it or another exception applies. In the absence of such a certificate or other exception, the bank is prohibited by §3403 from voluntarily delivering to the Government copies of any checks, periodic statements, advices concerning specific transactions, or any other documents relating to its customer's account.

Prior to the passage of the Act, there was no provision of federal law which limited in any way a bank's ability to voluntarily disclose to the Government any records or information the bank chose to reveal about its customers. This troubled members of Congress, as the legislative history of the Act plainly shows.[10] In response, Congress passed the Act,

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[10] Both the Senate and House Committee hearing records and reports relating to the Act are replete with expressions of concern in this regard by members of Congress. *See, e.g.*, Record of Hearings Before the Subcommittee on Financial Institutions Supervision, Regulation and Insurance of the Committee on Banking, Finance and Urban Affairs of the House of Representatives, ("House Hearings"), September 20, 1977, at 1506-1516 (Testimony of Senator Mathias) and Record of Hearings Before the Subcommittee on Financial Institutions of the Committee on Banking, Housing and Urban Affairs of the United States Senate ("Senate Hearings"), April 18, 1978, April 20, 1978 and May 17, 1978, at 147-158 (Testimony of Congressmen Pattison and Goldwater and Senator Mathias). In both hearings, Senator Mathias testified:

> I have long been troubled by the absence of Federal statutory provisions to safeguard against arbitrary and unwarranted review of private records held by third parties, including banks, credit issuing and telephone companies.

(Footnote continued)

which greatly restricts the Government's obtaining from a bank, or a bank's delivering to the Government, bank records relating to individual customers.

In light of the foregoing, the narrow voluntary disclosure exception contained in §3403(c) of the Act does not evidence a Congressional goal to encourage banks to voluntarily disclose information about their customers to the Government. Rather, the Act as a whole evidences Congress's intent to narrow the flow of information from banks to the Government unless the safeguards of the Act are observed.

The Court of Appeals' third and final rationale for its holding that the Act is inapplicable in the instant cases is that such holding furthers Congress's goal of encouraging international cooperation among governments in the exchange of investigative information. In this regard, the Court of Appeals observed that, were the Act held applicable, foreign

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> The necessity for Federal law to provide basic protections against privacy invasions becomes abundantly clear when you consider the nature of the records banks maintain.
>
> ***
>
> The very richness of the information contained in bank accounts raises the specter of Government abusing basic individual rights and liberties to obtain it.
>
> ***
>
> My concern over the failure of the Federal law to provide fundamental privacy safeguards, reinforced by revelations of unwarranted invasions of privacy by Government officials, led me to introduce legislation to fill this vacuum in our Federal laws.

Senate Hearings, at 152-153; House Hearings, at 1506-1509.

prosecutors would no longer seek the Department's assistance in their investigations and, instead, would retain private law firms to obtain and execute commissions on their behalf. Should this occur, the Court of Appeals reasoned, the Department would lose a bargaining chip it might otherwise use when it seeks assistance from foreign prosecuting authorities for its own investigations.

Such reasoning is faulty in several respects. First, the necessity of complying with the Act does not unreasonably impair the Department's ability to effectively assist a foreign government in its efforts to obtain documents for use in a foreign legal proceeding. If the Department desires to subpoena records pursuant to 28 U.S.C. §1782, all the Act requires is (1) that the Department have reason to believe that the records sought are relevant to a legitimate law enforcement inquiry; (2) that the Department procure a judicial subpoena which reasonably describes the records sought; (3) that the Department either notify the customer of the subpoena and of his applicable challenge rights under the Act, or obtain (and renew, if necessary) a delayed-notice order; and (4) that the Department certify to the financial institution from which it is seeking the information that it has complied with the Act. It is difficult to imagine how the Department's compliance with these procedural safeguards would cause foreign prosecutors to resort to the use of private law firms instead of the Department in obtaining information for use in foreign legal proceedings.

This is particularly true in view of the advantage that the Department's governmental stature imparts to requests it makes under 28 U.S.C. §1782. Requests under 28 U.S.C. §1782 are addressed to the sound discretion of the District Court. In deciding whether to grant a request made under 28 U.S.C. §1782, the district court is charged with evaluating whether the evidence sought is being requested for use in a proceeding before an impartial foreign tribunal. In addition, the district court must determine whether it is advisable to grant the request, taking into account "the nature and attitude of the government of the country from which the request emanates and the character of the proceedings in that country." 1964

U.S. Code Cong. Ad. News 3788; see also, *John Deere Limited v. Sperry Corp.*, 754 F.2d 132, 136 n.3 (3d Cir. 1985). If the Department, with all its prestige, undertakes to act on a foreign prosecutor's behalf, and represents to a district court that in its view a request under 28 U.S.C. §1782 should be granted, that endorsement will inevitably carry great weight in the district court's resolution of these questions. Foreign prosecuting authorities would not casually forego such an advantage merely to avoid compliance with the Act's requirements for delayed-notice orders or certificates of compliance.

The Court of Appeals' observation that requiring the Department to comply with the Act would cause private law firms to have "greater powers" than the Government under 28 U.S.C. §1782 may be true in the sense that a private law firm acting as a commissioner under 28 U.S.C. §1782 would not have to comply with the Privacy Act whereas the Department would. However, any such "greater power" in the hands of private law firms is a small price to pay for the elimination of the risk of governmental abuse with which Congress was concerned, a risk which the instant cases demonstrate is all too real.

Finally, even if the applicability of the Privacy Act to the facts of this case would tend to interfere with Congress's goal of encouraging intergovernmental exchanges of investigative information, there is no basis for the Court of Appeals' conclusion that Congress therefore must have intended that the Act not apply to the facts of the case. Congress also regarded the protection of individuals from unreasonable Governmental access to their banking records as an important goal. Given the plain language of the Act, the Court of Appeals had no justification for presuming that Congress's goal of fostering inter-governmental cooperation in the exchanging of investigative information was more important than its goal of protecting individuals from the risk of abuse by the Government.

7. *The Risk of Government Abuse*

The Court of Appeals' statement that its decision will not materially increase the risk of Government abuse because "a representative may apply for a commission only upon the request of a foreign party, and then only when the requesting party can adequately establish that the evidence sought will be used in a foreign tribunal" (A. 12), is, in petitioners' view, naive. The inclination of the Government to overreach is an everyday occurrence that requires no documentation. Here, the Department overreached, in some instances deceptively, in numerous ways.

First, the Department made ex parte applications for the appointment of Denton as a commissioner and for a court-ordered subpoena under the authority of 28 U.S.C. §1782 even though it knew, or should have known, that it was not lawfully entitled to such orders. The orders were sought for the purpose of obtaining documents and information in furtherance of a "preliminary investigation" by a foreign prosecutor (JA. 130), not, as required by 28 U.S.C. §1782, for "use in a foreign tribunal". In its application to the district court, the Department neglected to cite two landmark opinions of the Second Circuit which would have alerted the District Court that the commission and subpoena were not obtainable under applicable law in the Second Circuit. See *Fonseca v. Blumenthal*, 620 F.2d 322 (2d Cir. 1980), and *In the Matter of Letters Rogatory Issued by the Director of Inspection of the Government of India*, 385 F.2d 1017 (2d Cir. 1967).

Second, Denton applied for the delayed-notice order and restraining order under the authority of §3409 of the Act, even though at the time of the application, in the words of the Court of Appeals, "the Government did not believe the Act generally applied." (A. 15) The Court of Appeals said, "[T]he Government should have been more candid in its application..." (A. 16)

Third, after the Department expressly relied on the Act to obtain the delayed-notice order and restraining order in the *ex*

parte proceeding, the Department took the position in the Youngs' action against it that the Act did not apply to the Government on the facts of the case.

Fourth, the Department drafted, submitted to the District Court, and obtained *ex parte* an order that "the testimony or other evidence received in accordance with this Order are to be retained by the United States Department of Justice for such use as the Attorney General or his designated representative may deem appropriate." (JA. 127-128) In compliance with such order, Denton retains in a file in his office copies of the documents he received from Chemical. Neither Denton nor anyone else has averred that the Department had no interest in such documents or denied that the Government read such documents with a view to determining whether the Youngs had committed a violation of United States law.

Fifth, the Department, citing §3409 of the Act, obtained an order entitling it to delay for 90 days the notice to the Youngs required by the Act. After the 90 days elapsed, the Department failed to give the notice, saying in its brief to the Court of Appeals that such failure was an "error." Department Brief to the Court of Appeals, at 35.

In light of the foregoing, the Court of Appeals' conclusion that the risk of abuse by the Government in connection with any future proceedings under 28 U.S.C. §1782 is "quite low" (A. 12) does not ring true. To the contrary, the Department's actions in this case suggest that the risk of abuse in future proceedings under 28 U.S.C. §1782 is quite high.[11]

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[11] The Court should note that the Court of Appeals observed that there was nothing in the record that revealed that the Youngs had committed any United States crime and that the possibility exists that the Department would not have had a basis for obtaining the Youngs' bank records by grand jury subpoena. (A. 12 n.6)

8. *Recapitulation*

For all the reasons set forth above, the Court of Appeals clearly erred in determining that Congress intended there to be an implied exception to the prohibitions of the Act when a Government employee obtains individual customer information from a bank while acting as a court-appointed commissioner under a court-ordered subpoena. Such error was inexplicable in that the Court of Appeals explicitly acknowledged that, in searching for Congressional intent on the issue in point, it was operating without Congressional guidance. (A. 8-9)

> "Initially, we note that Congress never considered the question before us when it enacted the [Privacy Act]. For example, the Act does not contain a single reference to commissioners or letters rogatory, and nothing in the legislative history suggests that Congress weighed the possible impact of the Act on either of these procedures. Our determination of how broadly to construe the [Act] is made somewhat difficult by the absence of a clearly articulated purpose behind it." (A. 8-9)

Despite the complete absence of any evidence of Congress's intent as to whether or not the Act should apply to the facts of these cases, the Court of Appeals determined that it should not follow the plain language of the Act but instead should create an exception that undermines Congress's intent to provide individuals with appropriate safeguards against unwarranted Government intrusion into their banking affairs. Such a determination was totally at odds with this Court's teachings in *Andrus* and *Rutherford* and should be reversed.

Until Congress sees fit (if it ever sees fit) to enact an amendment to the Act, exempting the Government from compliance with the Act under the circumstances of these cases, the plain language of the Act mandates that the Act should apply under such circumstances. The Act should apply with even greater certainty when, as occurred in these cases, the Department reserves the right to review and use the

information it obtains on behalf of a foreign government for its own purposes and, as the petitioners contend occurred in these cases, the Department actually seeks and uses such information for its own purposes.

CONCLUSION

The petition for writs of certiorari should be granted.

Respectfully submitted,

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November, 1989

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1042, 1052—August Term, 1988

Argued: May 4, 1989 Decided: August 8, 1989

Docket Nos. 88-6314, 88-6318

SYBIL YOUNG and RODERICK YOUNG,

Plaintiffs-Appellants,

—against—

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant-Appellee.

SYBIL YOUNG and RODERICK YOUNG,

Plaintiffs-Appellants,

—against—

CHEMICAL BANK, N.A.,

Defendant-Appellee.

Before:

FEINBERG and NEWMAN, *Circuit Judges*, and TENNEY, *District Judge*.*

Appeals from final judgments of the United States District Court for the Southern District of New York (Keenan, *Judge*), granting defendants' motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Judgment in *Young v. United States Department of Justice* affirmed. Judgment in *Young v. Chemical Bank, N.A.* modified as stated herein.

STUART POTTER, New York City (Claudia Conway, Butler, Fitzgerald & Potter, New York City, of counsel), *for Plaintiffs-Appellants Sybil and Roderick Young*.

GABRIEL W. GORENSTEIN, Assistant United States Attorney for the Southern District of New York, New York City (Benito Romano, United States Attorney for the Southern District of New York, Edward T. Ferguson, III, Assistant United States Attorney for the Southern District of New York, New York City, of counsel) *for Defendant-Appellee United States Department of Justice*.

* The Honorable Charles H. Tenney, of the United States District Court for the Southern District of New York, sitting by designation.

BARBARA E. DANIELE, Assistant General Counsel, Chemical Bank, N.A., New York City, *for Defendant-Appellee Chemical Bank, N.A.*

TENNEY, *District Judge*:

In these cases, we examine the extent to which federal and state privacy laws restrict the ability of the federal government and banks to assist investigations in foreign countries. Plaintiffs appeal from judgments of the District Court for the Southern District of New York (John F. Keenan, Judge) dismissing these actions pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim for relief. We affirm in the case against the United States Department of Justice and modify the judgment in the case against Chemical Bank.

BACKGROUND

Appellants Sybil Young, a British citizen, and her husband Roderick, a citizen of Bermuda, operated several businesses in Bermuda. Sometime around 1981, Mrs. Young opened a checking account at a branch of Chemical Bank ("Chemical") in New York City. From 1981 to 1986, she regularly deposited large amounts of cash and travellers checks in her Chemical account by registered mail. Chemical's management became suspicious of the size and frequency of these deposits but a background check on Mrs. Young failed to disclose any criminal history.

The deposits continued to arrive and Chemical continued to process them for some time, despite its concerns.

Chemical finally refused to accept any more deposits after an incident in August 1986, when Mr. Young personally appeared at the bank with approximately $35,000 in travellers checks for deposit to his wife's account. A Chemical officer told Mr. Young that Chemical would not accept the deposit. The discussion turned into an argument, and Mr. Young left the bank. That night he placed the checks in the night deposit slot. Chemical did not process the checks when they were discovered the next day. Instead, it mailed them back to Mrs. Young in Bermuda.

Sometime during the next two or three months, Sol Froomkin, the Attorney General of Bermuda, received information from an informant that the Youngs were violating Bermuda's currency control laws. The identity of the informant has not been revealed but the Youngs allege that it was a representative of Chemical. In any event, on the basis of this tip, Froomkin initiated an investigation into the Youngs' banking activities with Chemical.

In connection with the investigation, representatives from Froomkin's office asked Chemical for information pertaining to Mrs. Young's account. They were told that Chemical would provide it only if compelled by subpoena. Froomkin telephoned the Office of the United States Attorney for the Southern District of New York for help and was referred to David Denton, the Executive Assistant United States Attorney. Denton eventually applied for, and was granted, an order from the District Court for the Southern District of New York appointing him a commissioner empowered to obtain evidence relevant to Froomkin's investigation. Under this authority, Denton obtained the account information with a court-ordered subpoena. He provided this evidence, along with other material acquired pursuant to his commission, to

Froomkin, who used it to obtain an indictment against the Youngs. Eventually, the Youngs both pleaded guilty to numerous violations of Bermuda law.

After their convictions, the Youngs initiated separate actions against the United States Department of Justice (the "Government") and Chemical, claiming that each had violated the Right to Financial Privacy Act, 12 U.S.C. §§ 3401-22 (1983 & Supp. 1988) ("RFPA" or the "Act") by failing to comply with certain provisions that the Youngs assert should have regulated the release of Mrs. Young's account information to the Government. In the action against Chemical, the Youngs also asserted claims based on confidentiality theories. The district court dismissed both lawsuits. It held that the Government was merely serving as a "conduit" for the Bermuda government when it obtained the account information and was, therefore, not a "government authority" within the meaning of the Act. The court also found, as a matter of New York State law, that appellants had no cause of action against Chemical arising from an alleged breach of confidentiality. The Youngs appeal from both dismissals.

DISCUSSION

A. *Applicability of the RFPA to Court-Appointed Commissioners*

Persons involved in foreign legal proceedings, who seek evidence located in the United States, may obtain it using letters rogatory or less-cumbersome requests for court-appointed commissioners, the ancient tools of international litigation. *See United States v. Mosby*, 133 U.S. 273, 282 (1890); *Nelson v. United States*, 17 F. Cas. 1340, 1341 (C.C.D. Pa. 1816) (No. 10,116); *Spanish Consul's*

Petition, 22 F. Cas. 854, 854 (S.D.N.Y. 1867) (No. 13,202); 4 J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 28.09[2] (2d ed. 1989) [hereinafter *Moore's*].[1] Private individuals may be appointed commissioners, *see In re Letter of Request for Judicial Assistance from the Tribunal Civil de Port-au-Prince, Republic of Haiti*, 669 F. Supp. 403, 407 (S.D. Fla. 1987), but, as in this case, foreign governments typically turn to law-enforcement authorities for help in criminal matters. *See, e.g., In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151, 1152 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 784 (1989) [hereinafter *Trinidad and Tobago*]; *In Re Request for International Judicial Assistance (Letter Rogatory) From the Federal Republic of Brazil*, 700 F. Supp. 723, 725 (S.D.N.Y. 1988) [hereinafter *Republic of Brazil*]. These cases require us to determine the applicability of the RFPA to law-enforcement officials who have been designated commissioners in such circumstances.

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1 The procedures governing such appointments are now codified in 28 U.S.C. § 1782(a) (1983), which provides:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement.

See also 22 C.F.R. § 92.67 (1988).

1. *Scope of the RFPA*

The RFPA provides, in pertinent part:

> [N]o Government authority may have access to or obtain copies of, or [sic] the information contained in the financial records of any customer from a financial institution unless . . . such customer has authorized such disclosure . . . [or] such financial records are disclosed in response to a judicial subpena which meets the requirements of . . . this title . . . .

12 U.S.C. § 3402. The RFPA defines a "government authority" as "any agency or department of the United States, or any officer, employee, or agent thereof." *Id.* § 3401(3). Were there no other circumstances for us to consider, we would have to find that Denton, as a Justice Department employee, fell within this definition. The district court found, however, that Denton was not specifically acting in that capacity when he obtained this information from Chemical. The specific question before us, therefore, is whether the RFPA applies when persons who would otherwise qualify as "government authorities" under the RFPA are appointed commissioners and, in that capacity, seek to obtain information from financial institutions with court-ordered subpoenas. We hold that it does not.

Initially, we note that Congress never considered the question before us when it enacted the RFPA. For example, the Act does not contain a single reference to commissioners or letters rogatory, and nothing in the legislative history suggests that Congress weighed the possible impact of the Act on either of these procedures. Our determination of how broadly to construe the RFPA is made somewhat difficult by the absence of a clearly articulated

purpose behind it. Certainly, a significant motivating factor for Congress was the Supreme Court's decision in *United States v. Miller*, 425 U.S. 435, 440 (1976), in which the Court held that bank customers have no reasonable expectation of privacy, under the fourth amendment, in bank records of their accounts. *See* H.R. Rep. No. 1383, 95th Cong., 2d Sess. 34 (1978) [hereinafter H. Rep.], *reprinted in* 1978 U.S. Code Cong. & Admin. News 9273, 9306 [hereinafter Code News]. The House Report accompanying the Act, for example, specifically disapproved of the *Miller* Court's failure to "acknowledge the sensitive nature of these records . . . ." *Id.*

Nevertheless, it would be reading too much into the Act to conclude that Congress intended to cloak bank records with an impenetrable veil of privacy in all contexts. As the House Report explains:

> [The Act] is intended to protect the customers of financial institutions from unwarranted intrusion into their records while at the same time permitting legitimate law enforcement activity. Therefore, [it] seeks to strike a balance between customers' right of privacy and the need of law enforcement agencies to obtain financial records pursuant to legitimate investigations.

H. Rep. at 33, *reprinted in* Code News at 9305. Congress determined that the best way to protect financial records from unwarranted governmental intrusion without crippling legitimate criminal investigations was to regulate the government's access. Yet, it observed that grand jury subpoenas, the mechanism of disclosure in *Miller*, have always been subject to judicial review. It exempted them from the Act after it decided the safeguards already in place would adequately protect against abuse. *See* 12

U.S.C. § 3413(i); H. Rep. at 35, *reprinted in* Code News at 9307; *id.* at 228, *reprinted in* Code News at 9358; *In re Grand Jury Subpoena Duces Tecum*, 767 F.2d 26, 30 (2d Cir. 1985).

Therefore, we believe Congress intended the RFPA to regulate the release of customer information from financial institutions in circumstances where adequate controls did not already exist. The subpoena served on Chemical, "so-ordered" by a district court, was not in this category because it was subject to judicial review even before it was served.[2] It thus received the same, if not higher, level of scrutiny given grand jury subpoenas. Construing the Act so as not to apply in such circumstances would be consistent with congressional intent.

Such an interpretation would also further related congressional goals. Congress has long recognized the freedom of individuals to provide information voluntarily for use in foreign proceedings. *See* 28 U.S.C. § 1782(b). The Act reveals Congress' objective of encouraging voluntary cooperation with law enforcement agencies. For example, Congress specifically exempted "tips" to law enforcement authorities by banks that suspect a customer of engaging in criminal activity. 12 U.S.C. § 3403(c).[3] In fact, it felt so strongly about encouraging voluntary cooperation that it subsequently added a provision preempting any other state or federal law to the contrary. *Id.* § 3403(c) (Supp. 1988). In addition, it declined to adopt certain provisions that would have restricted the ability of government authorities

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2 We need not decide whether the subpoena was validly issued. The issues raised by appellants concerning the validity of the subpoena do not vitiate Denton's status as a commissioner.

3 The information that may be disclosed is limited to the customer's identity or account number and the nature of the suspected illegal activity. 12 U.S.C. § 3403(c) (Supp. 1988).

to share information acquired under the Act with other agencies. It did so, in part, out of concern that the provisions would also restrict the ability of law enforcement groups to share evidence of criminal activity with foreign governments. *See Hearings on S. 2096 Before the Subcomm. on Financial Institutions*, 95th Cong., 2d Sess., 235-36 (1978) (statement of Hon. Harold M. Williams, Chairman of the Securities and Exchange Commission).

In 1964, Congress amended the statute governing foreign requests to enable the government to take a greater role in rendering assistance to foreign governments with the objective of stimulating reciprocal aid. *See* S. Rep. No. 1580, 88th Cong., 2d Sess. 7, *reprinted in* 1964 U.S. Code Cong. & Ad. News 3782, 3788; *In re Letter of Request From the Crown Prosecution Service of the United Kingdom*, 870 F.2d 686, 690 (D.C. Cir. 1989); *Trinidad and Tobago*, 848 F.2d at 1154; *In Re Request for Judicial Assistance From Seoul Dist. Criminal Court*, 428 F. Supp. 109, 112 (N.D. Cal.), *aff'd*, 555 F.2d 720 (9th Cir. 1977). The facts in this case illustrate the significance of that goal.[4] By limiting the application of the Act to "government authorities," Congress left untouched the activities of private commissioners, who—as appellants concede—may act on behalf of foreign governments without restriction by the RFPA. Since obtaining bank information appears to be one of the most common activities under-

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4 At one point, Froomkin expressed some frustration over the delay in Denton's appointment as a commissioner. He wrote:

> This matter is becoming somewhat embarrassing for me, since officials here are quering [sic] why we cannot get prompt assistance from the U.S., when in fact we in Bermuda invariably give requests from the U.S. the highest priority.

Letter from Sol M. Froomkin, Q.C., to David W. Denton, Esq., dated December 24, 1986 (Jt. App. (Young v. Department of Justice) 26).

taken by commissioners, *see, e.g., Trinidad and Tobago*, 848 F.2d at 1152; *Fonseca v. Blumenthal*, 620 F.2d 322, 323 (2d Cir. 1980); *Republic of Brazil*, 700 F. Supp. at 725-26, appellants' interpretation would leave private commissioners with greater powers in this important area than the law enforcement organizations traditionally contacted by foreign governments. The real possibility that foreign governments would begin to turn to private commissioners for assistance would undermine the government's ability to obtain reciprocal cooperation. Absent some indication that Congress even considered the issue, we are reluctant to give the Act an interpretation that would frustrate this independent objective. *See Lieberman v. Federal Trade Comm'n*, 771 F.2d 32, 40 (2d Cir. 1985).

In addition, we do not understand how appellants can claim that their interpretation of the Act would provide any additional protection. If the Government had not been able to obtain the account information in this case, Bermuda would simply have turned to a private commissioner, and the Youngs would still have been indicted and convicted.[5] Moreover, restricting the opportunity for representatives of the Government to serve as commissioners would not necessarily prevent it from obtaining financial records without complying with the RFPA. If Bermuda had chosen a private commissioner, nothing would have prevented it from sending copies of the account information to the Government on its own initiative or even upon the request of the Government. The impact on the Young's privacy interests in the account records would thus have been the same regardless of whether the infor-

5 Since the issue is not before us, we express no opinion on whether a lawful prosecution could or should be recognized as an "injury."

mation had been transmitted to Bermuda by a federal employee or a private commissioner.

Appellants argue that our decision will, nonetheless, increase the potential for Government abuse. They claim that it will provide a method for the Government to obtain information from banks when it cannot meet the requirements of the RFPA. We are aware that were it not for Bermuda's request for assistance, the Government might not have been able to obtain the Youngs' account information from Chemical.[6] The actual risk of abuse, however, is quite low. The Government's opportunity for manipulation is limited by the fact that a representative may apply for a commission only upon the request of a foreign party, and then only when the requesting party can adequately establish that the evidence sought will be used in a foreign tribunal. *See In re Doe*, 860 F.2d 40, 48 (2d Cir. 1988); *Fonseca*, 620 F.2d at 323-24; *In the Matter of Letters Rogatory Issued by the Director of Inspection of the Government of India*, 385 F.2d 1017, 1019 (2d Cir. 1967). Therefore, we do not share appellants' concerns.[7]

Nor do we find the precedent they cite persuasive. Their primary support is a footnote in an Eleventh Circuit opin-

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6 The record does not reveal any violations of United States law by the Youngs. Therefore, it is possible that the Government could not have obtained Mrs. Young's account information through the grand jury process.

7 The Government presently retains the account information in a special file and has stated that it has no present interest in investigating the Youngs. Jt. App. (Young v. Chemical Bank) 119-20. If it later changed its mind, however, we recognize that it would be far easier for investigators to open a file drawer than to use other methods to obtain this information. In light of that possibility, it might be appropriate for district courts to include in orders granting commissions to representatives of the Government a provision requiring the commissioner to seal all retained copies of applicable bank records as soon as they are transmitted to the requesting party or, at the latest, upon the expiration of the commission.

ion, which, in dictum, did no more than note that the commissioner involved would comply with the RFPA. *See Trinidad and Tobago*, 848 F.2d at 1156 n.12. The other is an opinion in which a district court noted the lack of analysis in the Eleventh Circuit footnote but decided to adopt it anyway. *See Republic of Brazil*, 700 F. Supp. at 725-26. Even in that case, however, the issue was not central to the controversy before the court, which essentially required that the expected release of information should occur in accordance with the terms of the RFPA. To the extent that these decisions stand for the proposition that the RFPA applies to the activities of court-appointed commissioners, however, we decline to follow them.

In conclusion, we hold that the RFPA does not apply to court-appointed commissioners, who would otherwise qualify as "government authorities" under the RFPA, when they seek information from financial institutions with court-ordered subpoenas.

2. *Judicial Estoppel*

Appellants assert that the Government should be precluded under the judicial estoppel doctrine from arguing that the Act does not apply. During discussions with Denton, Chemical indicated that, absent a court order to the contrary, it would ordinarily notify Mrs. Young that it had received a subpoena pertaining to her account. When informed of this, Froomkin told Denton that any such disclosure would jeopardize the ongoing investigation in Bermuda.[8] Denton decided to seek an order preventing Chemical's planned notification of Mrs. Young. The trou-

8 Froomkin's concerns appear to have been justified, since Mrs. Young fled to Great Britain after her husband was arrested and did not return to face prosecution for some period of time. Jt. App. (Young v. Department of Justice) 22.

ble is, the Government believed then, as it argues now, that the RFPA did not apply to its activities on behalf of Bermuda. Nevertheless, Denton applied for, and was granted, the order under section 3409 of the RFPA, which provides authority for a court to delay the notification otherwise required under the Act. *See* 12 U.S.C. § 3409(a). Appellants urge that, in light of the Government's affirmative use of this favorable provision, it cannot claim now that the Act does not apply.

Since appellants did not assert the judicial estoppel argument before the district court, we would not ordinarily consider the claim. *See Fleming v. New York University*, 865 F.2d 478, 481-82 (2d Cir. 1989); *Grace Towers Tenants Ass'n v. Grace Housing Development Fund Co.*, 538 F.2d 491, 495 (2d Cir. 1976). We have some reservations about the process by which the Government obtained the delay order, however, so we will briefly address the point.

In general, the judicial-estoppel doctrine, where it is recognized, may prevent a party who benefits from the assertion of a certain position, from subsequently adopting a contrary position. *See generally Hal David v. Showtime/The Movie Channel*, 697 F. Supp. 752, 762-63 (S.D.N.Y. 1988); *Long Island Lighting Co. v. Transamerica Deleval, Inc.*, 646 F. Supp. 1442, 1447-48 (S.D.N.Y. 1986); 1B *Moore's* ¶ 0.405[8]; 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4477 (1981) [hereinafter *Wright & Miller*]. It is supposed to protect judicial integrity by preventing litigants from playing "fast and loose" with courts, thereby avoiding unfair results and "unseemliness." *Long Island Lighting*, 646 F. Supp. 1447 (quoting 1B *Moore's* ¶ 0.405[8] at 240 and 18 *Wright & Miller* § 4477 at 779). The circumstances under which the doc-

trine could be applied are far from clear. *Universal City Studios, Inc. v. Nintendo Co.*, 578 F. Supp. 911, 920-21 & n.3 (S.D.N.Y. 1983), *aff'd*, 746 F.2d 112 (2d Cir. 1984); 1B *Moore's* ¶ 0.405[8] at 243-46; 18 *Wright & Miller* § 4477 at 780-81 (1981). The key ingredient, however, is reliance. *See* 18 *Wright & Miller* § 4477 at 779-80.

In light of the *ex parte* nature of the Government's application, appellants do not, and could not, assert that they somehow relied to their detriment on the Government's initial position. *Cf. id.* § 4477 at 780-81 ("Given the great freedom permitted by modern federal procedure to assert inconsistent positions in a single action, and to amend pleadings to advance inconsistent positions for the first time during the course of suit, reliance on positions initially taken by an adversary is not well advised."). Similarly, the reliance of the court that issued the delay order, on the Government's implicit representation that the RFPA applied, was not the type that would warrant application of the doctrine. What occurred here is quite different from a situation in which a party has obtained favorable relief with an implicit but misleading representation to a court that he would not subsequently switch positions. *See Sperling v. United States*, 692 F.2d 223, 227-29 (2d Cir. 1982) (Van Graafeiland, J., concurring), *cert. denied*, 462 U.S. 1131 (1983).

We find no evidence that Denton intended to mislead or deceive the court when he applied for the delay order under the RFPA. Although the Government did not believe the Act generally applied, there was certainly room for a difference of opinion. Chemical apparently felt it applied, so it was reasonable for the Government to acquiesce in that view if it believed it could avoid litigating the issue and still protect the integrity of Froomkin's investi-

gation. We will leave for another day the determination of whether the court would have had the power, absent the provision in the RFPA, to order Chemical not to notify Mrs. Young of the existence of the subpoena. We do observe, though, that the question is not a trivial one.[9] Since the Government's application was *ex parte*, it should have, at the very least, alerted the court to the possibility that the Act did not apply. *See Matter of Grand Jury Applications for Court-Ordered Subpoenas and Nondisclosure Orders—December 1988 Term*, 142 Misc. 2d 241, 243, 536 N.Y.S.2d 939, 940 (Sup. Ct. 1988) [hereinafter *Grand Jury Applications*]. Had it done so, the court would have properly determined its authority to grant the delay order. *Id.*

Despite our belief that the Government should have been more candid in its application, this is not the type of conduct the judicial estoppel doctrine seeks to deter. Moreover, in light of our conclusion that the RFPA does not apply to court-appointed commissioners, we do not see how the judicial-estoppel doctrine could affect the outcome of this case. If certain conduct falls outside a statute, the subsequent actions of an attorney cannot put it within its scope, especially where the consequence would be to subject the United States to liability for damages. For all of these reasons, we reject the claim of judicial estoppel.

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9 Prior to its amendment, *see* 12 U.S.C. § 3413(i), several federal courts decided that the RFPA did not provide any authority for delayed-notification orders concerning grand-jury subpoenas and struggled to find independent grounds upon which to issue them. *See, e.g., In re Grand Jury Subpoena Duces Tecum*, 797 F.2d 676, 680 (8th Cir.), *cert. dismissed*, 479 U.S. 1013 (1986); *In re Grand Jury Subpoena Duces Tecum*, 575 F. Supp. 93, 94 (S.D.N.Y. 1983); *see also Matter of Grand Jury Applications for Court-Ordered Subpoenas and Nondisclosure Orders—December 1988 Term*, 142 Misc. 2d 241, 248, 536 N.Y.S.2d 939, 943 (Sup. Ct. 1988) (searching for such authority under New York law).

B. *Chemical's Alleged Breach of Confidentiality*

Appellants' state-law claims essentially allege a breach of a confidential relationship between Mrs. Young and Chemical. At the outset, we note that Chemical's compliance with a judicially-authorized subpoena would immunize it from liability for any required disclosures. *See, e.g., Suburban Trust Co. v. Waller*, 44 Md. App. 335, 344, 408 A.2d 758, 764 (1979); *Grand Jury Applications*, 142 Misc. 2d at 248, 536 N.Y.S.2d at 943; *Graney Development Corp. v. Taksen*, 92 Misc. 2d 764, 767-68, 400 N.Y.S.2d 717, 720 (Sup. Ct.), *aff'd*, 66 A.D.2d 1008, 411 N.Y.S.2d 756 (App. Div. 1978). Nevertheless, appellants have also alleged that Chemical disclosed information about Mrs. Young's account to Bermuda before any subpoena had been issued. We turn our attention to that aspect of the case.

Breach of confidence is a relative newcomer to the tort family. Like the law of privilege, it is rooted in the concept that the law should recognize some relationships as confidential to encourage uninhibited discussions between the parties involved. *See Doe v. Roe*, 93 Misc. 2d 201, 210, 400 N.Y.S.2d 668, 674 (Sup. Ct. 1977); Note, *Breach of Confidence: An Emerging Tort*, 82 Col. L. Rev. 1426, 1436 (1982) [hereinafter Note]. The breach-of-confidence theory may be applicable to a wide spectrum of associations but it has been asserted most frequently in the context of physician-patient and bank-customer relationships. *See* Note at 1431. At this point, New York courts have recognized it only in the context of physician-patient relationships. *See Tighe v. Ginsberg*, 146 A.D.2d 268, 270-71, 540 N.Y.S.2d 99, 100-01 (App. Div. 1989); *MacDonald v. Clinger*, 84 A.D.2d 482, 483-84, 446 N.Y.S.2d 801, 804-05 (App. Div. 1982); *Doe*, 93 Misc. 2d at 210-11, 400

N.Y.S.2d at 674-75. As a court sitting in diversity, we must determine whether they would extend it to banker-depositor relationships as well. *See Comm'r v. Estate of Bosch*, 387 U.S. 456, 465 (1967); *Magavern v. United States*, 550 F.2d 797, 801 (2d Cir.), *cert. denied*, 434 U.S. 826 (1977).

Since it is in its infancy, the breach-of-confidence cause of action is still experiencing growing pains. In recognizing it, "[m]ost courts have resorted to a confused tangle of legal theories, including invasion of privacy, implied term of contract, implied private cause of action in statute, and tortious breach of confidence . . . ." Note at 1437 (footnotes omitted); *see also Doe*, 93 Misc. 2d at 206, 400 N.Y.S.2d at 672 (noting conflicting analysis by New York courts in this area). We do not profess to know which source, or combination of sources, best supports or explains the contours of the doctrine, but we do not find appellants' implied-contract theory to be the appropriate starting point.

Recovery in contract, unlike recovery in tort, allows only for economic losses flowing directly from the breach. *Tighe*, 146 A.D.2d at 271, 540 N.Y.S.2d at 100; *MacDonald*, 84 A.D.2d at 486, 446 N.Y.S.2d at 804; *Restatement (Second) of Contracts* § 353 (1981). The physician-patient cases, and this case presumably, involve emotional suffering by the alleged victim of the breach, damages that would not be recoverable if the confidential relationship existed only by virtue of a contract. Moreover, recovery in contract is limited by foreseeability theories, firmly imprinted in the mind of every lawyer who studied *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145

(1854), during the first year of law school.[10] It is doubtful that Mrs. Young and the Chemical representative helping her open the account considered that a breach of some kind of implied agreement might result in the arrest and prosecution of Mrs. Young and her husband. Therefore, while contract theories may have contributed to the development of the breach-of-confidence cause of action, it owes its existence to several doctrines, including the right to privacy. *See Virelli v. Goodson-Todman Enterprises, Ltd.*, 142 A.D.2d 479, 485, 536 N.Y.S.2d 571, 575 (App. Div. 1989).

We perceive that New York's courts have been rather conservative in recognizing causes of action for damages in the privacy field. *See, e.g., Arrington v. New York Times Co.*, 55 N.Y.2d 433, 439-41, 434 N.E.2d 1319, 1321-22, 449 N.Y.S.2d 941, 943-44 (1982), *cert. denied*, 459 U.S. 1146 (1983); *Beverly v. Choices Women's Medical Center, Inc.*, 141 A.D.2d 89, 95, 532 N.Y.S.2d 400, 405 (App. Div.), *appeal dismissed*, 73 N.Y.2d 785, 533 N.E.2d 673, 536 N.Y.S.2d 743 (1988). For example, New York's Court of Appeals has consistently held that there is no common-law right to privacy in New York. *See Arrington*, 55 N.Y.2d at 439-41, 434 N.E.2d at 1321-22, 449 N.Y.S.2d at 943-44; *Cohen v. Hallmark Cards*, 45 N.Y.2d 493, 497 n.2, 382 N.E.2d 1145, 1146 n.2, 410 N.Y.S.2d 282, 284 n.2 (1977). Its legislature has restricted the right of privacy, in disputes between private parties, to

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10 For those who did not foresee the need to remember the *Hadley* case, it established that damages in contract actions are limited to those that "may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." *Hadley*, 9 Ex. at 354, 156 Eng. Rep. at 151.

cases involving unauthorized use of a person's name or likeness. *See* N.Y. Civ. Rights Law §§ 50-51 (McKinney 1976 & Supp. 1989); *Arrington*, 55 N.Y.2d at 439-41, 434 N.E.2d at 1321-22, 449 N.Y.S.2d at 943-44; *Doe*, 93 Misc. 2d at 212, 400 N.Y.S.2d at 676; *see also* N.Y Pub. Off. Law § 97 (McKinney 1988) ("Civil remedies" section of Personal Privacy Protection Law, which applies to violations by government agencies, does not provide for monetary damages). Despite our earlier prediction that New York would have, by now, recognized a general right of privacy, *Galella v. Onassis*, 487 F.2d 986, 995 (2d Cir. 1973), its legislature and courts have steadfastly refused to do so. *Arrington*, 55 N.Y.2d at 439-40, 434 N.E.2d at 1321-22, 449 N.Y.S.2d at 943-44; *see Doe*, 93 Misc. 2d at 212 n.8, 400 N.Y.S.2d at 676 n.8.

Even in the context of the physician-patient relationship, New York courts have recognized that the individual right of confidentiality is limited by broader societal concerns. In *MacDonald v. Clinger*, for example, the court stated that "although public policy favors . . . confidentiality [in the physician-patient context], there is a countervailing public interest to which it must yield in appropriate circumstances." 84 A.D.2d at 487, 446 N.Y.S.2d at 805. In *Doe v. Roe*, the court recognized that a physician's obligation of confidentiality "is not absolute and must give way to the general public interest." 93 Misc. 2d at 214, 400 N.Y.S.2d at 677.[11] Courts in states that recognize

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11 This occurs, for example, when a patient clearly presents a danger to others, contracts a reportable disease, uses controlled substances or sustains a gunshot wound. *MacDonald*, 84 A.D.2d at 487, 446 N.Y.S.2d at 805; *Doe*, 93 Misc. 2d at 214, 400 N.Y.S.2d at 677. The *Doe* court refused to recognize an exception to the confidentiality requirement when the only countervailing consideration is "curiosity or education of the medical profession." *Doe*, 93 Misc. 2d at 214, 400 N.Y.S.2d at 677.

the cause of action in banking contexts have imposed analogous limitations. In *Indiana Nat'l Bank v. Chapman*, 482 N.E.2d 474, 482 (Ind. App. 1985), a case relied upon by appellants, a bank revealed information about a customer's banking history to a police officer who suspected the customer of involvement in criminal activity. The court decided that the bank had only a limited duty of confidentiality, explaining that it may not disclose customer information "unless a public duty arises," and holding that "[c]ommunication to legitimate law enforcement inquiry meets the public duty test." *Id.* In the present case, appellants allege that the bank, rather than a law enforcement official, initiated the contact. Even so, it is possible that New York courts would find that voluntary disclosure to a law enforcement agency serves the general "public interest" articulated in *MacDonald* and *Doe*. *Cf.* 12 U.S.C. § 3403(c) (voluntary tip to federal law enforcement agency cannot form basis for any liability); *see also Beverly*, 141 A.D.2d at 97, 532 N.Y.S.2d at 406 (Brown, J., concurring in part and dissenting in part) (scope of "public-interest" exceptions to statutory right to privacy "is very broad and it has been held that this exception is to be liberally construed"). *See generally* Note at 1465 (suggesting that a bank should be able to notify law enforcement authorities only when its suspicions about a customer's criminal activity are reasonable).

Like the district court, we have difficulty articulating any rationale upon which to extend the breach-of-confidence cause of action to banking relationships.[12]

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12 The district court noted that New York courts have consistently followed the Supreme Court's holding in *Miller* that customers have no standing to challenge subpoenas directed at their bank records. *See*,

Mutual trust is, to be sure, a worthwhile goal in all relationships, but we do not see any reason to put discussions between banks and their depositors in the same class as those between physicians and patients. The type of disclosure encouraged in that context is hardly necessary for the bank-depositor relationship to function effectively. That is undoubtedly why courts have not recognized a banker-client testimonial privilege. *See Rosenblatt v. Northwest Airlines*, 54 F.R.D. 21, 22 (S.D.N.Y. 1971); *see also King v. E.F. Hutton & Co.*, 117 F.R.D. 2, 8 (D.D.C. 1987) (refusing to recognize stockbroker-client privilege).

Nevertheless, we have no doubt that most depositors believe banks will keep their banking activities confidential. At the very least, banks have fostered that impression. The American Bankers Association counsels its members that customer account information should generally be kept confidential, *see Milohnich v. First Nat'l Bank of Miami*, 224 So. 2d 759, 761 (Fla. App. 1969) (citing 1 *Paton's Digest* 619 (Opinion 19-1) (1940)), and acknowledges that most customers assume that banking transactions are confidential, *see Hearings on H.R. 8133 Before the Subcomm. on Financial Institutions' Supervision, Regulation and Insurance*, 95th Cong., 2d Sess. (1977) (statement of Morris F. Miller on behalf of the American Bankers Association) (H. Rep. at 1586). *See also Restatement (Second) of Agency* § 395 (stating that

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e.g., *Doe v. Blumenkopf*, 118 A.D.2d 279, 282, 505 N.Y.S.2d 225, 227 (App. Div. 1986); *People v. Doe*, 96 A.D.2d 1018, 1019, 467 N.Y.S.2d 45, 46 (App. Div. 1983); *see also People v. DiRaffaele*, 55 N.Y.2d 234, 242, 433 N.E.2d 513, 516, 448 N.Y.S.2d 448, 451 (1982) (citing *Miller* with apparent approval). We do not find these decisions controlling, since the mere fact that customers do not have a fourth amendment interest in these records does not mean that they could not have any privacy interest in a civil context. *Compare Indiana Nat'l Bank*, 482 N.E.2d at 478, *with id.* at 480-82, 484.

agent should keep information obtained from principal confidential). Banks have cited the existence of a confidential relationship in arguments contesting subpoenas. *See, e.g., In re Sandin*, 134 Misc. 2d 968, 969, 513 N.Y.S.2d 645, 646 (Sur. Ct. 1987). In this case, Chemical refused to release Mrs. Young's records without a court-ordered subpoena. We believe that any customer who has ever tried to get his or her own account balance over the phone from an obdurate bank employee would be quite surprised to learn that the same information could be freely disclosed to a law enforcement agency.

Therefore, we are not surprised that courts in several jurisdictions have applied the breach-of-confidence doctrine in banking contexts. *See Barnett Bank of West Florida v. Hooper*, 498 So. 2d 923, 925 (Fla. 1986); *Milohnich*, 224 So. 2d at 759; *Suburban Trust Co. v. Waller*, 44 Md. App. 335, 344, 408 A.2d 758, 764 (1979); *Peterson v. Idaho First Nat'l Bank*, 83 Idaho 578, 588, 367 P.2d 284, 290 (1961); *Indiana Nat'l Bank*, 482 N.E.2d at 482; *Tournier v. National Provincial and Union Bank of England*, 1 K.B. 461, 475, 480, 484; Annotation, *Bank's Duty to Customer not to Disclose Information as to His Financial Condition*, 92 A.L.R.2d 900 (1963). Indeed, at least one New York court demonstrated a willingness to extend the cause of action to this area. In *Graney Development Corp. v. Taksen*, 92 Misc. 2d 764, 767-68, 400 N.Y.S.2d 717, 720 (Sup. Ct.), *aff'd*, 66 A.D.2d 1008, 411 N.Y.S.2d 756 (App. Div. 1978), the court appeared to accept the argument that a confidential relationship existed between banks and their depositors but refused to recognize it when mere borrowers were involved. In affirming the *Graney* decision, the appellate court adopted the reasoning of the lower court and never indicated any disagreement with the assumption that the relationship could exist

in other banking contexts. Moreover, the court in *Grand Jury Applications*, 142 Misc. 2d at 248, 536 N.Y.S.2d at 943, noted that bank customers may enjoy common-law-privacy protection of their account records. Therefore, if a New York court applied the doctrine to banking relationships, it would not be breaking any significant legal ground.[13]

Although we might be inclined to hold that the breach-of-confidence cause of action should not be extended to banking relationships, we recognize that such a decision could have serious repercussions for the New York banking community. We are particularly concerned that if we found no duty requiring New York banks to keep account information confidential, some customers might be inclined to transfer their business from institutions in this jurisdiction, home to one of the world's financial capitals, to banks in "confidential" jurisdictions. We feel that a New York court would be in the best position to assess that possible impact on the local banking industry.

Considering the still-developing nature of the breach-of-confidence doctrine, the lack of New York precedent and the local policy issues involved, our prediction of what a state court would do with this question would be little more than a guess. If we turned out to be wrong, subsequent state-court action, or legislation, "overruling" our decision, might not occur for several years—possibly too late to reverse any resultant damage to the banking com-

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13 We, along with at least one other court in this circuit, have alluded to a bank's duty in New York to keep customer information confidential, citing *Graney*. *See Aaron Ferer & Sons, Ltd. v. Chase Manhattan Bank*, 731 F.2d 112, 123 (2d Cir. 1984); *Sharma v. Skaarup Ship Management Corp.*, 699 F. Supp. 440, 449 (S.D.N.Y. 1988). Other circuits have suggested that banks have a general duty to keep customer information confidential. *See, e.g., Peoples Bank of Virgin Islands v. Figueroa*, 559 F.2d 914, 917 (3d Cir. 1977).

munity. In a related context, the Supreme Court has cautioned that federal courts should avoid providing "a tentative answer which may be displaced tomorrow by a state adjudication." *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 500 (1941). That principle is even more compelling in a case such as this, when a federal court's decision on a matter of state law might possibly inflict wide-ranging damage on the local community.

Alluding to these considerations, appellants have asked us to exercise our power to abstain and to dismiss the state-law claims without prejudice, so they may be pursued in state court. *See* Brief for Appellants (Young v. Chemical) at 11-12. Chemical has not expressed any views on the abstention issue. In *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 820 (1976), the Court noted that federal courts have a "heavy obligation to exercise jurisdiction" in cases before them. *See also id.* at 817 (noting "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them"); *id.* at 819 ("[o]nly the clearest of justifications will warrant dismissal"). It explained:

> Abstention from the exercise of federal jurisdiction is the exception, not the rule. "The doctrine of abstention . . . is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest."

Id. at 813 (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959)). In deciding

whether to abstain, courts should conduct "a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983); *see Law Enforcement Insurance Co. v. Corcoran*, 807 F.2d 38, 40 (2d Cir. 1986), *cert. denied*, 481 U.S. 1017 (1987).

Our decision in this case is also guided by the principle that federal courts should leave for state court determination "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." *Colorado River*, 424 U.S. at 814. We believe this is such an issue, which we feel would best be determined in a setting lending itself to prompt review by New York's appellate courts. Moreover, the parties' interests in our retaining jurisdiction are not particularly compelling. The case has progressed no further in the district court than the filing of a complaint and motions to dismiss and appellants, who initiated these actions, have expressly asked us to consider abstaining. Had this not been the case, or if Chemical had raised any objection to the possibility of our abstaining, we might have been more reluctant to send the parties to state court. *See Colorado River*, 424 U.S. at 820. In light of our affirmance of the dismissal of the federal causes of action and the procedural posture of the case, however, we believe justice would best be served by providing a New York court the opportunity to decide the state-law question, the only issue remaining. *See Moses H. Cone Memorial Hospital*, 460 U.S. at 28.

The abstention issue was also not raised before the district court and we have considered it only because of the potentially serious repercussions that might accompany an

affirmance. *Id.* at 29. We are confident that if the district court had been given the opportunity to consider the matter, it would have reached the same conclusion that we have, so we see no reason to remand for any further consideration. Accordingly, we modify the judgment of the district court to the extent it dismissed the claims against Chemical so that they are now dismissed without prejudice, with leave to refile in New York state court.

CONCLUSION

The judgment of the district court dismissing the action against the Government is affirmed. The judgment of dismissal in the case against Chemical is modified as described above.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

SYBIL YOUNG and RODERICK YOUNG,

Plaintiffs,

-against-

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

----------X

87 Civ. 8307 (JFK)

OPINION and ORDER

APPEARANCES:

For Plaintiffs:
Butler, Fitzgerald & Potter
New York, New York
Of Counsel: Stuart Potter, Esq.
Claudia Conway, Esq.
Ruby Warren, Esq.

For Defendants:
Rudolph W. Giuliani
United States Attorney for the
Southern District of New York
New York, New York
Of Counsel: Gabriel W. Gorenstein, Esq.
Assistant United States Attorney

JOHN F. KEENAN, United States District Judge

JOHN F. KEENAN, United States District Judge:

This matter, involving an alleged violation of the Right to Financial Privacy Act, 12 U.S.C. § 3401 *et. seq.*, is before the Court on defendant's motion to dismiss the complaint for failure to state a claim, Fed. R. Civ. P. 12(b)(6), or in the alternative, for summary judgment. Fed. R. Civ. P. 56. Plaintiffs move for summary judgment and pursuant to Fed. R. Civ. P. 42(a) to consolidate this action with *Young v. Chemical Bank*, 87 Civ. 8061 (JFK). For the reasons stated below, defendant's motion is granted and plaintiffs' motions are denied.

FACTS

In the fall of 1986, Sol Froomkin, the Attorney General of Bermuda, contacted the Office of the United States Attorney for the Southern District of New York by telephone. *See* Declaration of David W. Denton, dated February 5, 1988 ("Denton Decl."), ¶ 2. Mr. Froomkin sought the assistance of the United States in obtaining for Bermuda certain financial records of Sybil Young and Roderick Young ("the Youngs"). These records related to an account maintained by Sybil Young at a branch of Chemical Bank ("Chemical") in Manhattan. At that time, the Bermuda Attorney General stated that his office had received information that the Youngs had violated Bermuda law by virtue of certain currency transactions that might be reflected in Chemical's records. See id.

Subsequent to this telephone conversation, the Bermuda Attorney General sent a formal written request for assistance in obtaining these records to Assistant United States Attorney David Denton. Mr. Denton presented this letter rogatory to the Hon. Charles E. Stewart, Jr., of this Court in a proceeding entitled *In Re Request for International Judicial Assistance from the Attorney General of Bermuda* M19-118 (S.D.N.Y. 1987) by means of an "Affidavit and Application for Appointment of Commissioner." *See* Denton Decl., ¶¶ 6-7, Exh. B. The Court issued the proposed Order appointing two Assistant United States Attorneys as Commissioners pursuant

to 28 U.S.C. § 1782 to "obtain testimony and other evidence" which was to be submitted "to representatives of the government of Bermuda." *See* Order, dated January 28, 1987, appearing as Exh. C to Denton Decl.

By a subsequent "Affidavit and Application", which is undated, the United States Attorney's Office also requested the Court to "so order" a deposition subpoena requiring the production of the Young records located at Chemical. This order included a provision enjoining Chemical employees from disclosing the existence of the subpoena to any person absent further direction from the Court. *See* Deposition Subpoena, dated January 30, 1987; Affidavit and Application, undated, appearing as Exh. D to Denton Decl.

In accordance with these orders, the appointed Commissioners arranged for the requested records and certain affidavits of Chemical employees to be transmitted to Bermuda. *See* Denton Decl. ¶¶ 9-17, Exs. E, F, G, H. Based on the information provided by Chemical, on August 13, 1987 an indictment was filed with the Supreme Court of Bermuda against Roderick and Sybil Young. The indictment charged the Youngs with 22 counts of making a false statement for the purpose of buying foreign currency; 14 counts of exporting foreign currency notes without permission of the Controller; one count of attempting to export foreign currency notes without permission of the Controller; and 11 counts of exporting travellers' checks without permission of the Controller. *See Queen v. Roderick Carl Young, Sybil Young and Richard Outerbridge,* Case No. 31 of 1987, reproduced as Exh. D to Affidavit of Barbara E. Daniele, dated January 11, 1988, in *Young v. Chemical Bank*, 87 Civ. 8061 (JFK). After one count was withdrawn, on August 25, 1987, Sybil Young pled guilty to 46 of the 47 remaining counts; Roderick Young pled guilty to 45 of the 47 remaining counts. *See* Declaration of Douglas S. Schofield ("Schofield Decl."), Exh. A. The defendants were sentenced to up to two years imprisonment on each of the convictions, or in the alternative, sentenced to pay fines in the amounts of $746,000 (for Sybil Young) and $184,500 (for Roderick Young).

The instant lawsuit followed. The Complaint sets forth two claims, one on behalf of each of the Youngs, alleging that the United States Attorney's Office's actions constituted a violation of the Right to Financial Privacy Act, 12 U.S.C. § 3401 *et seq.* (the "Privacy Act").

DISCUSSION

A motion to dismiss for failure to state a claim may be granted only if it appears certain that under no possible set of facts would the plaintiff be entitled to relief. *See Lipsky v. Commonwealth United Corp.*, 551 F.2d 887 (2d. Cir. 1970). Even if it appears on the face of the pleadings that recovery is very remote, the complaint will withstand the motion to dismiss as long as the plaintiff retains a possibility of success. *See Scheuer v. Rhodes*, 416 U.S. 232 (1974). Moreover, in deciding a motion to dismiss, the court must view the complaint in the light most favorable to the plaintiff. *See id.* at 237.

Construing the facts under this analysis, the Court must conclude that the Youngs are unable to prevail on their Privacy Act claims as a matter of law.

A. *The Right to Financial Privacy Act*

The Right to Financial Privacy Act was enacted as part of the Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. 95-630, 92 Stat. 3641. The Privacy Act was enacted, in large part, to address *United States v. Miller*, 425 U.S. 438 (1976), where the Supreme Court held that a bank customer has no constitutionally protected privacy interest in bank records pertaining to the customer. *See* [1978] U.S. Code Cong. & Admin. News 9306. The legislative history of the Privacy Act states that its purpose is:

> to protect the customers of financial institutions from unwarranted intrusion into their records while at the same time permitting legitimate law enforfcement

> activity. Therefore, the title seeks to strike a balance between customers' right of privacy and the need of law enforcement agencies to obtain financial records pursuant to legitimate investigations.

Id. at 9305.

The Privacy Act does not grant *per se* rights to bank customers. Rather, it establishes certain procedures that are to be followed before federal law enforcement agencies may obtain access to bank records. The central provision of the Privacy Act states that "no Government authority may have access to or obtain copies of, or the information contained in the financial records of any customer from a financial institution unless the records are reasonably described" and the government agency seeking the records first obtains authorization, either from the customer or by another authority. 12 U.S.C. § 3042. The Privacy Act defines "Government authority" as "any agency or department of the United States, or any officer, employee, or agent thereof." 12 U.S.C. § 3401(3). With this legislative framework in mind, it is apparent that the United States Attorney's Office's procurement of Sybil Young's bank records pursuant to 28 U.S.C. § 1782 for the Bermuda Attorney General was not subject to the Privacy Act's strictures.

Section 1782 facilitates the assistance of foreign and international tribunals in obtaining information for use in foreign proceedings. The section provides in relevant part:

> (a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the

> document or other thing be produced, before a person appointed by the court.

28 U.S.C. § 1782.

The United States Attorneys appointed by Judge Stewart as Commissioners to compel the production of information relating to the Youngs were appointed pursuant to 28 U.S.C § 1782. *See* Denton Decl., Exh. C. As such, the Commissioners were merely "conduits" for the receipt and transmission of requests issued by the Bermuda Attorney General. *See, e.g., Societe Nationale Industrielle Aerospatiale v. United States District Court,* 107 S. Ct. 2542, 2548 n.13 (1987). By contrast, the Privacy Act restricts the federal government's access to customer records for use in investigations conducted by the United States.

The only reported case specifically addressing the applicability of the Privacy Act's strictures to acts of a Commissioner authorized under 28 U.S.C. § 1782 to obtain production of information held that the Privacy Act does not apply. In *In Re Letter of Request for Judicial Assistance from the Tribunal Civil de Port-Au-Prince, Republic of Haiti,* 669 F. Supp. 403 (S.D. Fla. 1987), a former Haitian government official moved to vacate an order appointing a Commissioner pursuant to 28 U.S.C. § 1782 and to quash a subpoena for bank records issued under that order. The official argued that failure to comply with the Privacy Act barred the subpoena at issue. Dismissing this position, the Court held:

> Nothing in the language or history of the [Right to Financial Privacy Act] shields [the official's] financial records from discovery requested pursuant to Section 1782. This Court will not extend the reach of the [Right to Financial Privacy Act] to requests that emanate from foreign governments. *Id.* at 407.

Mr. Denton avers that the production of records and the taking of testimony pursuant to Judge Stewart's subpoena were

at the request of the Bermudian Government. *See* Denton Decl., ¶¶ 3-5. The United States Attorney's Office has not conducted any independent investigation into the Youngs' affairs. *See* Denton Decl., ¶ 19. Thus, the Court must conclude that the Commissioners here were merely conduits of information and hence not subject to the Privacy Act.

Plaintiffs attempt to distinguish *Haiti* from the instant matter contending that in *Haiti* a private party, not a governmental entity had been appointed Commissioner. They speculate that the *Haiti* Court "would obviously have been more circumspect" had a federal employee been appointed Commissioner. Plaintiff's Memorandum at 29. Nothing in the *Haiti* case supports plaintiff's view.

In neither case did the Commissioner appointed by the district court have the slightest interest of its own in the subpoenaed information. In both cases an individual's bank records were subpoenaed by the appointed Commissioner to aid a criminal investigation in a foreign country. The law firm appointed Commissioner in *Haiti* fulfilled the identical function to that of the United States Attorney's Office in the present case, i.e. the transmission of evidence at the request of a district court to be used in a foreign criminal investigation. The bank customer's concern was the same in both cases: the shielding of financial records from a foreign criminal inquiry.

This Court also rejects plaintiff's contention that the United States Attorney's Office, acting as Commissioner under 28 U.S.C. § 1782, procured financial information within the meaning of the Privacy Act. In *Republic of Haiti v. Crown Charters, Inc.*, 667 F. Supp. 839 (S.D. Fla. 1987), a Florida District Court issued a subpoena pursuant to section 1782 appointing a law firm Commissioner to gather information about Jean-Claude Duvalier's claim to assets in the United States. *See id.* at 847-48. The *Crown Charters* Court ruled that the Commissioner acts as a representative of the foreign

tribunal* and not in its own individual capacity in compelling the production of testimony and documents:

> The [Commissioner] has obviously had wide latitude in obtaining information about Duvalier's activities and possible Haitian claims on assets in the United States because of the firm's status as commissioner. This fact, however, does not compel the conclusion that Crown should have the right to open discovery of all the information gathered by the Commissioner or the unbridled right to depose [the Commissioner]. One of the purposes of 28 U.S.C. § 1782 is to permit the extension of *assistance to foreign tribunals in resolving foreign disputes*. *See In Re Letters Rogatory from the Tokoyo District*, 539 F.2d 1216, 1218 (9th Cir. 1976). Although the statute vests the commissioner with limited judicial capacity such as the power to administer oaths, the commissioner's primary function is to represent the interests of Haiti in conducting the requested discovery. Thus, the [Commissioner] is at all times an advocate for Haitian interests . . . .

Id. at 848 (emphasis added).

This Court is persuaded that where a request for information for use in a foreign proceeding emanates from a foreign tribunal the Commissioner appointed to obtain such information is merely a conduit to the foreign tribunal. As such, it is the foreign tribunal that has "access to" or "obtains" financial records within the meaning of the Privacy Act when the procurement is effected under 28 U.S.C. § 1782. Thus, the actions of the United States Attorney's Office in the instant matter did not fall within the purview of the Privacy Act.

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* Reference to a "foreign tribunal" in this opinion means "Foreign or international tribunal" or "any interested person" as those terms are used in 28 U.S.C. § 1782.

A colorable argument could be made by the Youngs that the request for information concerning their bank records emanated from the district court that issued the subpoena. Such a position would only prevail if the Privacy Act is construed to require a district court acting under 28 U.S.C. § 1782 to comply with the Privacy Act's notice provisions. This Court, however, is unconvinced that a federal district court is a "Government authority" within the meaning of the Privacy Act. *A fortiori,* the United States Attorney's Office, acting as a Commissioner appointed by the district court in the instant matter, cannot be a "Government authority" within the meaning of the Privacy Act.

Under the Privacy Act, a "Government authority" is defined as any "agency or department of the United States." 12 U.S.C. § 3401(3). In *Doe v. Board of Professional Responsibility of the District of Columbia Court of Appeals,* 717 F.2d 1424 (D.C. Cir. 1983), the District of Columbia Circuit held that the District of Columbia Court of Appeals was not a "Government authority" within the meaning of the Privacy Act. *Id.* at 1427. Following the rationale of *Doe,* this Court finds that the judicial branch is not included in the definition of "Government authority."

In the instant matter, Judge Stewart appointed Commissioners to act simply as an arm of the Court. Logically, then, the Commissioners should be afforded the same protections which the Court enjoys. A contrary conclusion would create a harsh and inequitable situation for the United States Attorney's Office here: accept the Court's appointment and become subject to liability for damages. This Court declines to expose Commissioners to damage awards for performing a court-appointed function.

The soundness of this interpretation is apparent considering that the United States Attorney's Office had no interest in the Youngs' financial records. The United States Attorney's Office has never conducted any investigation of the Youngs and has never used the records it obtained from Chemical Bank. *See* Denton Decl. ¶¶ 19-20. Its authority to obtain the

records from Chemical did not derive from its being a law enforcement agency. Its authority derived solely from its appointment by order of Judge Stewart. Therefore, the indispensable occurrence which triggers the Privacy Act is not present here: that a "Government authority" "have access to or obtain copies of" information "contained in financial records." 12 U.S.C. § 3402.

In addition to the interpretation of the Privacy Act set forth above, the Court observes that there is a specific provision in the Privacy Act that exempts evidence obtained pursuant to a letter rogatory. Section 3413(d) of the Privacy Act provides:

> Nothing in [the RFPA] shall authorize the withholding of financial records or information required to be reported in accordance with any Federal statute or rule promulgated thereunder.

This broad provision was intended to be liberally construed. The sponsor of the bill stated in the House Report:

> This exception permits the disclosure of financial records or information required to be reported by other laws, or rules or regulations promulgated under them. Instead of attempting to list all such provisions, which might inadvertently result in omissions, the subsection covers generally any statute or regulation.

[1978] U.S. Code Cong. & Admin. News 9356. It is beyond cavil that 28 U.S.C. § 1782 is a federal statute which required that Chemical disclose the requested financial information. As such, the information provided by Chemical was "required to be reported" and thus not subject to the Privacy Act's strictures.

Plaintiffs next contend that the requirements of 28 U.S.C. § 1782 were not satisfied because no formal criminal proceeding was pending when Judge Stewart issued the subpoena for the financial records. This argument ignores the

1964 amendment to section 1782 which eliminated the requirement that a foreign proceeding be pending at the time the request for information is made by the foreign entity. The caselaw and commentary concur that there is no requirement under section 1782 that a proceeding be pending before a foreign tribunal when the request is made. *See, e.g., In re Letter Request from the Crown Prosecution Service of the United Kingdom*, 683 F. Supp. 841 (D.D.C. 1988); *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobego*, 648 F. Supp. 464 (S.D. Fla. 1986), *aff'd*, 848 F.2d 1151 (11th Cir. 1988); *H. Smit, Inter-National Litigation Under The United States Code*, 65 Colum. L. Rev. 1015, 1026 (1965).

Plaintiffs next assert that the Attorney General of Bermuda is not a "tribunal" within the meaning of section 1782 and therefore the letter rogatory from that Attorney General should not have been honored under section 1782. Plaintiffs correctly point out that the question of who or what constitutes a "tribunal" is controlled in this circuit by *Fonesca v. Blumenthal*, 620 F.2d 322 (2d Cir. 1980), and *In re Letters Rogatory Issued by Director of Inspection of Government of India*, 385 F.2d 1017 (2d Cir. 1967). Those cases are readily distinguished, however, from the instant matter.

In *Fonesca* and *India*, the request came from an entity that was to act as the adjudicator of the rights of the individual involved. *See Fonesca*, 385 F.2d at 1021 (declining to acknowledge a "tribunal" where there is no "degree of separation between the prosecutorial and adjudicative functions."); *India*, 620 F.2d at 324 (declining to recognize a "tribunal" where the entity combined investigatory powers with jurisdiction "to determine whether violation of the law has occurred."). There was to be no later tribunal to weigh impartially the evidence. In the instant action, the evidence was to be used as part of a criminal prosecution before an impartial judge. *See* Affidavit of Robin Mayer, ¶¶ 12-14.

Moreover, this Court notes that there is no requirement that the request come from a foreign "tribunal." Section 1782 also

recognizes applications for judicial assistance from an "interested person." The legislative history explains:

> A request for judicial assistance under the proposed revision may either be contained in letter rogatory or other request or be made in a direct application by an interested person, such as a person designated by or under a foreign law, or a party to the foreign or international litigation. Subsection (a) specifically so provides.

[1964] U.S. Code Cong. & Admin. News 3789.

Following *Trinidad and Tobago*, 648 F. Supp. at 466, this Court determines that an Attorney General is an "interested person" within the meaning of section 1782. As Hans Smit, the Reporter to the Commission and Advisory Committee of International Rules of Civil Procedure explains,

> the [term "interested person"] is intended to include not only litigants before foreign or international tribunals, but also foreign and international officials as well as any other person whether he be designated by foreign law or international convention or merely possess a reasonable interest in obtaining the assistance.

H. Smit, *Inter-National Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1027 (1965).

The Attorney General of Bermuda clearly possessed a reasonable interest in obtaining the assistance requested of the United States Attorney's Office. He is empowered by Section 71 of the Bermuda Constitution Order "to institute...criminal proceedings against any person...in respect of any offence [sic] against any law in force in Bermuda." Attorney General Froomkin's request to the United States Attorney's Office specified what documents he sought and that they were essential to an investigation into alleged violations of Bermuda's Exchange Control Regulations. *See* Denton Decl.,

Exh. A. The Attorney General of Bermuda is clearly an "interested person" under section 1782.

Finally, the Youngs are also troubled that the United States Attorney's Office retains copies of the financial records it obtained for the Bermuda Attorney General. The Court, however, is unmoved by plaintiffs' suggestion that these retained financial records may be used against them in a future proceeding in a United States court. First, the Court notes that the Department of Justice has not used the records to date in any investigation of its own. *See* Denton Decl., ¶ 20. Moreover, as a practical matter, if the Department of Justice wishes to engage in its own investigation into plaintiffs' criminal activity, the grand jury process is available to the Department. Grand jury subpoenas are exempt from the requirements of the relevant portions of the Privacy Act. *See* 12 U.S.C. § 3413(i). The legislative history of the Privacy Act indicates that grand jury subpoenas were exempted because grand juries "operate under judicial scrutiny." [1978] U.S. Code Cong. & Admin. News 9307. Because the United States Attorney's Office retains the investigatory powers attendant to grand juries, it appears unlikely that the Office would run afoul of the Privacy Act if it decided to investigate the Youngs.

CONCLUSION

For the reasons stated above, the defendant's motion to dismiss the complaint is granted. Because this opinion and order dismisses the action, the Court need not address plaintiffs' motion to consolidate this action with *Young v. Chemical Bank, N.A.*, 87 Civ. 8061 (JFK). This action is ordered to be removed from the active docket of this Court.

SO ORDERED.

Dated: New York, New York
November, 28, 1988

/s/ John F. Keenan
JOHN F. KEENAN
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

SYBIL YOUNG and RODERICK YOUNG,

Plaintiffs,

-against-

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

----------X

87 Civ. 8307 JFK
JUDGMENT

Defendant having moved to dismiss the complaint for failure to state a claim, or in the alternative for summary judgment; plaintiff having moved for summary judgment and pursuant to Fed. R. Civ. P. 42(a) to consolidate this action with *Young v. Chemical Bank*, 87 Civ. 8061 (JFK), and the said motions having come before the Honorable John F. Keenan, U.S.D.J., and the Court thereafter on November 28, 1988, having handed down its opinion and order (#63448), granting defendant's motion and denying plaintiff's motions, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed.

DATED: NEW YORK, N.Y.
November 30, 1988

/s/ Raymond F. Burghard
Clerk

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON 12/1/88.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

SYBIL YOUNG and RODERICK YOUNG,

Plaintiffs,

-against-

CHEMICAL BANK, N.A.,

Defendant.

----------X

87 Civ. 8601 (JFK)

OPINION and ORDER

APPEARANCES:

For Plaintiffs:
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Claudia Conway, Esq.
Ruby Warren, Esq.

For Defendant:
Kenneth J. Kelley, Esq.
New York, New York
Of Counsel: Barbara E. Daniele, Esq.

JOHN F. KEENAN, United States District Judge

JOHN F. KEENAN, United States District Judge:

Defendant Chemical Bank, N.A. ("Chemical") moves this Court for an order pursuant to Fed. R. Civ. P. 12(b)(6) dismissing plaintiffs' complaint for failure to state a claim and awarding attorney's fees and costs pursuant to Fed. R. Civ. P. 11. Plaintiffs, Sybil and Roderick Young ("the Youngs"), oppose these motions and cross-move for partial summary judgment on their first and second claims. For the reasons set forth below, plaintiffs' complaint is dismissed, but the Court declines to impose attorney's fees and costs pursuant to Rule 11.

FACTS

This action arises out of the same facts as *Young v. Department of Justice*, 87 Civ. 8037 (JFK). This opinion and order adopts the statement of facts set forth in the opinion and order in that case dated November 28, 1988. To the degree necessary they are amplified below.

In the fall of 1986, Sol Froomkin, the Attorney General of Bermuda, contacted the Office of the United States Attorney for the Southern District of New York by telephone. *See* Declaration of David W. Denton, dated February 5, 1988 ("Denton Decl."), ¶ 2. Mr. Froomkin sought the assistance of the United States in obtaining for Bermuda certain financial records of Sybil Young and Roderick Young ("the Youngs"). These records related to an account maintained by Sybil Young at a branch of Chemical Bank ("Chemical") in Manhattan. At that time, the Bermuda Attorney General stated that his office had received information that the Youngs had violated Bermuda law by virtue of certain currency transactions that might be reflected in Chemical's records. *See id.*

Subsequent to this telephone conversation, the Bermuda Attorney General sent a formal written request for assistance in obtaining these records to Assistant United States Attorney David Denton. Mr. Denton presented this letter rogatory to the Hon. Charles E. Stewart, Jr., of this Court in a proceeding

entitled *In Re Request for International Judicial Assistance from the Attorney General of Bermuda* M19-118 (S.D.N.Y. 1987) by means of an "Affidavit and Application for Appointment of Commissioner." *See* Denton Decl., ¶¶ 6-7, Exh. B. The Court issued the proposed Order appointing two Assistant United States Attorneys as Commissioners pursuant to 28 U.S.C. § 1782 to "obtain testimony and other evidence" which was to be submitted "to representatives of the government of Bermuda." *See* Order, dated January 28, 1987, appearing as Exh. C to Denton Decl.

By a subsequent "Affidavit and Application", which is undated, the United States Attorney's Office also requested the Court to "so order" a deposition subpoena requiring the production of the Young records located at Chemical. This order included a provision enjoining Chemical employees from disclosing the existence of the subpoena to any person absent further direction from the Court. *See* Deposition Subpoena, dated January 30, 1987; Affidavit and Application, undated, appearing as Exh. D to Denton Decl.

In accordance with these orders, the appointed Commissioners arranged for the requested records and certain affidavits of Chemical employees to be transmitted to Bermuda. *See* Denton Decl. ¶¶ 9-17, Exs. E, F, G, H. Based on the information provided by Chemical, on August 13, 1987 an indictment was filed with the Supreme Court of Bermuda against Roderick and Sybil Young. The indictment charged the Youngs with 22 counts of making a false statement for the purpose of buying foreign currency; 14 counts of exporting foreign currency notes without permission of the Controller; one count of attempting to export foreign currency notes without permission of the Controller; and 11 counts of exporting travellers' checks without permission of the Controller. *See Queen v. Roderick Carl Young, Sybil Young and Richard Outerbridge*, Case No. 31 of 1987, reproduced as Exh. D. to Affidavit of Barbara E. Daniele, dated January 11, 1988 ("Daniele Aff."). After one count was withdrawn, on August 25, 1987, Sybil Young pled guilty to 46 of the 47 remaining counts; Roderick Young pled guilty to 45 of the 47

remaining counts. *See* Declaration of Douglas S. Schofield ("Schofield Decl."), Exh. A. The defendants were sentenced to up to two years imprisonment on each of the convictions, or in the alternative, sentenced to pay fines in the amounts of $746,000 (for Sybil Young) and $184,500 (for Roderick Young).

The instant lawsuit followed. The Complaint sets forth four claims. Both of the Youngs allege that Chemical's disclosure of Sybil Young's financial records constituted a violation of the Right to Financial Privacy Act, 12 U.S.C. § 3401 *et seq.* (the "Privacy Act"). Sybil Young also claims that Chemical's disclosure breached an implied contract not to disclose financial information to third parties and constituted a tortious intrusion on Sybil's right to privacy. The Youngs seek an indeterminate amount of compensatory damages and $10,000,000 in punitive damages on each of the claims.

DISCUSSION

A motion to dismiss for failure to state a claim may be granted only if it appears certain that under no possible set of facts would the plaintiff be entitled to relief. *See Lipsky v. Commonwealth United Corp.*, 551 F.2d 887 (2d Cir. 1970). Even if it appears on the face of the pleadings that recovery is very remote, the complaint will withstand the motion to dismiss as long as the plaintiff retains a possibility of success. *See Scheuer v. Rhodes*, 416 U.S. 232 (1974). Moreover, in deciding a motion to dismiss, the court must view the complaint in the light most favorable to the plaintiff. *See id.* at 237.

Construing the facts under this analysis, the Court must conclude that the Youngs are unable to prevail on their Privacy Act claims as a matter of law.

A. *Sybil Young's The Right to Financial Privacy Act Claim*

The Right to Financial Privacy Act was enacted as part of the Financial Institutions Regulatory and Interest Rate Control

Act of 1978, Pub. L. 95-630, 92 Stat. 3641. The Privacy Act was enacted, in large part, to address *United States v. Miller*, 425 U.S. 438 (1976), where the Supreme Court held that a bank customer has no constitutionally protected privacy interest in bank records pertaining to the customer. *See* [1978] U.S. Code Cong. & Admin. News 9306. The legislative history of the Privacy Act states that its purpose is:

> to protect the customers of financial institutions from unwarranted intrusion into their records while at the same time permitting legitimate law enforcement activity. Therefore, the title seeks to strike a balance between customers' right of privacy and the need of law enforcement agencies to obtain financial records pursuant to legitimate investigations.

Id. at 9305.

The Privacy Act does not grant *per se* rights to bank customers. Rather, it establishes certain procedures that are to be followed before federal law enforcement agencies may obtain access to bank records. The central provision of the Privacy Act states that "no Government authority may have access to or obtain copies of, or the information contained in the financial records of any customer from a financial institution unless the records are reasonably described" and the government agency seeking the records first obtains authorization, either from the customer or by another authority. 12 U.S. C. § 3042. The Privacy Act defines "Government authority" as "any agency or department of the United States, or any officer, employee, or agent thereof." 12 U.S.C. § 3041(3). "Financial institution" is defined as "any office of a bank . . . located in any State . . . of the United States." 12 U.S.C. § 3401(1). Any financial institution which discloses a customer's financial records in violation of the Privacy Act's strictures is subject to compensatory and punitive damages awards. See 12 U.S.C. § 3417(a). With this legislative framework in mind, it is apparent that Chemical's disclosure of Sybil Young's bank records pursuant to a subpoena issued under 28 U.S.C. § 1782 did not run afoul of the Privacy Act.

Section 1782 facilitates the assistance of foreign and international tribunals in obtaining information for use in foreign proceedings. The section provides in relevant part:

> (a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.

28 U.S.C. § 1782.

The United States Attorneys appointed by Judge Stewart as Commissioners to compel the production of information relating to the Youngs were appointed pursuant to 28 U.S.C. § 1782. *See* Denton Decl., Exh. C. As such, the Commissioners were merely "conduits" for the receipt and transmission of requests issued by the Bermuda Attorney General. *See, e.g., Societe Nationale Industrielle Aerospatiale v. United States District Court*, 107 S. Ct. 2542, 2548 n.13 (1987). By contrast, the Privacy Act restricts the federal government's access to customer records for use in investigations conducted by the United States.

The only reported case specifically addressing the applicability of the Privacy Act's strictures to acts of a Commissioner authorized under 28 U.S.C. § 1782 to obtain production of information held that the Privacy Act does not apply. In *In Re Letter of Request for Judicial Assistance from the Tribunal Civil de Port-Au-Prince, Republic of Haiti*, 669 F. Supp. 403 (S.D. Fla. 1987), a former Haitian government official moved to vacate an order appointing a Commissioner pursuant to 28 U.S.C. § 1782 and to quash a subpoena for

bank records issued under that order. The official argued that failure to comply with the Privacy Act barred the subpoena at issue. Dismissing this position, the Court held:

> Nothing in the language or history of the [Right to Financial Privacy Act] shields [the official's] financial records from discovery requested pursuant to Section 1782. This Court will not extend the reach of the [Right to Financial Privacy Act] to requests that emanate from foreign governments. *Id.* at 407.

Mr. Denton avers that the production of records and the taking of testimony pursuant to Judge Stewart's subpoena were at the request of the Bermudian Government. *See* Denton Decl., ¶¶ 3-5. The United States Attorney's Office has not conducted any independent investigation into the Youngs' affairs. *See* Denton Decl., ¶ 19. Thus, the Court must conclude that the Commissioners here were merely conduits of information and hence not subject to the Privacy Act.

Plaintiffs attempt to distinguish *Haiti* from the instant matter contending that in *Haiti* a private party, not a governmental entity had been appointed Commissioner. They contend that had "any person other than an officer, employee or agent of a federal department" been Judge Stewart's appointee, "there would have been no . . . possible violation of the Privacy Act." Plaintiffs' Memorandum at 10-11. Nothing in the Privacy Act or the *Haiti* case supports plaintiffs' attempt to distinguish *Haiti* from the instant case.

In neither case did the Commissioner appointed by the district court have the slightest interest of its own in the subpoenaed information. In both cases an individual's bank records were subpoenaed by the appointed Commissioner to aid a criminal investigation in a foreign country. The law firm appointed Commissioner in *Haiti* fulfilled the identical function to that of the United States Attorney's Office in the present case, i.e. the transmission of evidence at the request of a district court to be used in a foreign criminal investigation. The

bank customer's concern was the same in both cases: the shielding of financial records from a foreign criminal inquiry. Moreover, Hans Smit, the reporter to the Commission that drafted the proposals for the 1964 amendment to section 1782 which Congress adopted, stated that "[w]hile the court is *free to select any person* [as Commissioner] *it deems appropriate*, it ordinarily should appoint the person designated by the foreign or international tribunal . . . ." H Smit, *Inter-National Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1027 (1965) (emphasis added). Judge Stewart did precisely this by appointing as commissioners the Assistant United States Attorneys who were contacted by the Bermuda Attorney General.

As this Court has determined that the Commissioners in this case acted properly, *see Young v. Department of Justice*, 87 Civ. 8037 (JFK), Opinion and Order dated November 21, 1988, and that the Commissioners actions did not fall within the purview of the Privacy Act, it would be absurd to hold that Chemical disclosed Sybil Young's records in violation of the Privacy Act. Chemical was served with a subpoena, regular on its face, requiring testimony and production of all records at Chemical pertaining to Roderick Young and/or Sybil Young. The subpoena contained an order prohibiting Chemical from disclosing to any person the existence of and Chemical's compliance with the subpoena. Failure to comply with the subpoena would have subjected Chemical to an order of contempt. This Court cannot penalize compliance with a subpoena where such compliance did not violate any federal statute.

In addition to the interpretation of the Privacy Act set forth above, the Court observes that there is a specific provision in the Privacy Act that exempts evidence obtained pursuant to a letter rogatory. Section 3413(d) of the Privacy Act provides:

> Nothing in [the RFPA] shall authorize the withholding of financial records or information required to be reported in accordance with any Federal statute or rule promulgated thereunder.

This broad provision was intended to be liberally construed. The sponsor of the bill stated in the House Report:

> This exception permits the disclosure of financial records or information required to be reported by other laws, or rules or regulations promulgated under them. Instead of attempting to list all such provisions, which might inadvertently result in omissions, the subsection covers generally any statute or regulation.

[1978] U.S. Code Cong. & Admin. News 9356. It is beyond cavil that 28 U.S.C. § 1782 is a federal statute which required that Chemical disclose the requested financial information. As such, the information provided by Chemical was "required to be reported" and thus not subject to the Privacy Act's strictures.

Plaintiffs also contend that even if the Privacy Act does not apply to Chemical's disclosures pursuant to the subpoena, Chemical is nonetheless liable for disclosures made outside the scope of the subpoena. See Affidavit of Sybil Young ("Sybil Young Aff."), ¶ 34. Plaintiffs maintain that Chemical employees provided at least nine statements outside the scope of the subpoena to the Commissioners. *See* Sybil Young Aff., Exh. F. Even assuming the truth of this assertion, plaintiffs cannot make out a Privacy Act violation.

28 U.S.C. § 1782(b) permits the kind of unsubpoenaed disclosures plaintiffs assert were provided:

> This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

28 U.S.C. ¶ 1782(b).

That section's legislative history demonstrates that Congress adopted this measure to stimulate cooperation in international litigation. *See* [1964] U.S. Code Cong. & Admin. News 3782-83. The legislative history provides:

> Subsection (b) of proposed revised section 1782 reaffirms the pre-existing freedom of persons within the United States voluntarily to give testimony or statements or produce tangible evidence in connection with foreign or international proceedings or investigations. This explicit reaffirmation is considered desirable to stress in the relations with foreign countries the large degree of freedom existing in this area in the United States. It also serves to make clear that subsection (a) leaves that freedom unaffected. *Id.* at 3790.

Plaintiffs have adduced no authority which controverts this clear legislative sanction of voluntary assistance to international investigations. This Court is disinclined to hinder in any way an entity which desires to assist foreign investigations.

B. *Roderick Young's Right to Financial Privacy Act Claim*

Although the analysis set forth above applies with equal force to the Privacy Act claims of both Youngs, Roderick Young's claim is also barred because he is not a "customer" or "authorized representative" regarding any account at Chemical. This conclusion is apparent from a review of the terms "financial record" and "customer" under the Privacy Act.

Under the Privacy Act, " 'financial record' means an original of, a copy of, or information known to have been derived from, any record held by a financial institution pertaining to a customer's relationship with the financial institution." 12 U.S.C. § 3401 (2). The Privacy Act defines "customer" as "any person or authorized representative of that person who utilized or is utilizing any service of a financial institution ... in relation to an account maintained in the

person's name." 12 U.S.C. § 3401 (5). Roderick Young has no account or fiduciary relationship with Chemical. *See* Affidavit of Robert Stephenson ("Stephenson Aff."), ¶ 2. Moreover, "Sybil Young never advised Chemical that Roderick Young was authorized to transact business with Chemical on her behalf, nor did she file with the Bank the necessary power-of-attorney to permit him to act as her authorized representative." *Id.* That Roderick Young did not have the requisite relationship with Chemical to bring him within the safeguards of the Privacy Act is confirmed by the "Sectional Analysis and Explanation" of the Department of Justice cited with approval by plaintiffs:

> A "customer" in turn, is a person who uses a service of an office of a financial institution, or for whom the institution acts as a fiduciary, but only in relation to an account maintained in the person's name. *The definitions of "financial records" and "customer", taken together, are intended to preclude application of the bill to anyone other than the person whose account information the government seeks access.* They would exclude, for example, the endorsers of checks and guarantors of loans.

Affidavit of Stuart Potter, Exh. C (Section 1101(3)) (emphasis added).

Because Roderick Young is not a Chemical "customer" and the common law impediment to a married woman bringing suit in her own right has long been abolished, *see* New York General Obligations Law § 3-301(3), Roderick Young lacks standing to sue under the Privacy Act.

C. *Implied Contract Not to Disclose Financial Information*

Sybil Young's third claim for relief is predicated on the existence of an implied agreement between a bank and its customer not to disclose financial information about the customer to third parties. She alleges that Chemical's disclosure of information pertaining to deposits in her account

violated an implied term of her deposit account agreement with Chemical. This Court declines to recognize such an implied term in deposit accounts in light of *United States v. Miller*, 425 U.S. 435 (1976).

In *Miller*, the Supreme Court ruled that where bank records of a depositor's account are furnished in response to legal compulsion, the Fourth Amendment is not implicated. *See id.* at 443. In reaching this conclusion, the Supreme Court reasoned that the customer has no ownership or possessory interest in checks and deposit slips voluntarily delivered to the bank and, therefore, "takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government." *Id.* This is the precise risk that Sybil Young assumed when she opened her account with Chemical.

Sybil Young next submits that New York law should recognize an implied term of confidentiality in a contract between a bank and its depositor. She admits that no New York decision has held that such a term exists, but requests this Court to review relevant New York caselaw and determine that the New York Court of Appeals would recognize an implied term of confidentiality.

When a federal district court is faced with a question of state law, the district court is to turn to the caselaw of the state's highest court for instruction on the question. *See Commissioner of Internal Revenue v. Estate of Bosch*, 387 U.S. 456, 465 (1967). Where no clear directive on the question has yet issued from the state's highest court, the district court is "required to sit 'as a state court' to decide the case as might a state tribunal." *Magavern v. United States*, 550 F.2d 797, 801 (2d Cir.), *cert. denied*, 434 U.S. 826 (1977). In doing so, the district court is free to consider whatever information the highest court of the state might weigh in reaching a decision. *See* C. Wright, *Law of Federal Courts* 373 (4th ed. 1983).

Plaintiffs cite only one New York case which, in *dicta*, suggests that "[t] here is a reasonable expectation that a bank

will treat as confidential any information about a depositor's account." *Graney Development Corp. v. Taksen*, 92 Misc. 2d 764, 400 N.Y.S.2d 717, 720 (Sup. Ct. Monroe Co.), *aff'd*, 66 A.D.2d 1008, 411 N.Y.S.2d 756 (4th Dept. 1978). Besides being only *dicta*, this conclusion by the *Graney* court is clearly premised on the absence of a court order compelling production of financial information. *See id.* This Court is unwilling to recognize a new cause of action in New York on the basis of the tenuous underpinning provided in *Graney*.

Moreover, this Court has located several New York cases which, consistent with *United States v. Miller*, 425 U.S. 435 (1976), note that subpoenaed bank information is readily disclosable because the customer has no proprietary interest in that information. *See, e.g., People v. Doe*, 84 A.D.2d 182, 445 N.Y.S.2d 768, 780-83 (2d Dept. 1981); *Evans v. Carey*, 53 A.D.2d 109, 385 N.Y.S.2d 965, 969-70 (4th Dept.) *aff'd*, 40 N.Y.2d. 1008, 359 N.E.2d 983, 391 N.Y.S.2d 393 (1976); *Shapiro v. Chase Manhattan Bank, N.A.*, 53 A.D.2d 542, 384 N.Y.S.2d 795, 796 (1st Dept. 1976). Accordingly, this Court declines to create a cause of action for breach of an implied term of confidentiality in deposit agreements when the New York courts do not seem inclined to do so.

Finally, Sybil Young alleges that Chemical's disclosures constituted a tortious intrusion on Sybil's right to privacy. *See* Complaint, ¶ 27. This allegation is fundamentally errant. No common law right to privacy exists in New York. The New York right to privacy exists solely by virtue of New York Civil Rights Law § 50. *See Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 480 N.E.2d 349, 490 N.Y.S.2d 735 (1975). Sybil Young's alleged injury does not fall within the statutory right granted by that provision.

Apparently aware that a colorable claim for invasion of privacy could not be proven, plaintiffs' counsel in its memorandum recharacterizes the claim as one "for tortious breach by Chemical of Sybil's implied right of confidentiality." Plaintiff's Memorandum at 36. Plaintiffs admit that to date the New York courts have only recognized this cause of action in

the context of the doctor-patient relationship. Thus, plaintiffs ask this court to elevate what is essentially a debtor-creditor relationship, *see Brigham v. McCabe*, 20 N.Y.2d 525, 232 N.E.2d 327, 285 N.Y.S.2d 294 (1967), to a relationship where communications may be privileged. This is nonsense.

Rule 11

Chemical asserts that the Youngs' claims are so groundless as to warrant the imposition of sanctions under Rule 11. In this circuit

> sanctions shall be imposed against an attorney and/or his client when it appears that a pleading has been interposed for any improper purpose, *or where*, after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." *Eastway Const. Corp. v. City of New York*, 762 F. 2d 243, 254 (2d Cir. 1985), *cert. denied*, 108 S.Ct. 269 (1987) (emphasis in original).

This Court is not convinced that the Youngs' claims were so goundless as to warrant sanctions.

CONCLUSION

For the foregoing reasons, the defendant's motion to dismiss the complaint is granted. Defendant's motion for attorney's fees and costs is denied. This action is ordered removed from the active docket of this Court.

SO ORDERED.

Dated: New York, New York
November 30, 1988

/s/ John F. Keenan
JOHN F. KEENAN
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SYBIL YOUNG and RODERICK YOUNG,

Plaintiffs,

-against-

CHEMICAL BANK, N.A.,

Defendant.

87 Civ. 8061 JFK
JUDGMENT

Defendant having moved for an order pursuant to Fed. R. Civ. P. 12(b)(6), dismissing plaintiffs' complaint and awarding attorney's fees and costs pursuant to Fed. R. Civ. P. 11; plaintiffs having cross-moved for partial summary judgment on their first and second claims, and the said motions having come before the Honorable John F. Keenan, U.S.D.J., and the Court thereafter on December 1, 1988, having handed down its opinion and order (#63474), granting defendant's motion to dismiss the complaint; denying defendant's motion for attorney's fees and costs; ordering that this action be removed for the active docket of this Court, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed.

DATED: NEW YORK, N.Y.
December 13, 1988

/s/ Raymond F. Burghart
Clerk

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON 12/14/88

United States Court of Appeals
for the
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of August one thousand nine hundred and eighty-nine.

Present: HON. WILFRED FEINBERG, C.J.
HON. JON O. NEWMAN, C.J.
HON. CHARLES H. TENNEY, D.J.

Circuit Judges,

SYBIL YOUNG and RODERICK YOUNG,
Plaintiffs-Appellants,

- against -

UNITED STATES DEPARTMENT OF JUSTICE,
Defendant-Appellee.

88-6314,
88-6318

SYBIL YOUNG and RODERICK YOUNG,
Plaintiffs-Appellants,

- against -

CHEMICAL BANK, N.A.,
Defendant-Appellee.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of the District Court dismissing the action against the Government is affirmed. The judgment of dismissal in the case against Chemical is modified as described above, pursuant to the opinion of this court.

ELAINE B. GOLDSMITH
Clerk

/s/ Edward J. Guardaro
By: EDWARD J. GUARDARO,
Deputy Clerk

United States Court of Appeals
for the
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 30th day of August, one thousand nine hundred and eighty-nine.

Present:

HONORABLE WILFRED FEINBERG

HONORABLE JON O. NEWMAN

Circuit Judges

HONORABLE CHARLES H. TENNEY*

District Judge

88-6314,
88-6318

SYBIL YOUNG and RODERICK YOUNG,

Plaintiffs-Appellants,

- against -

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant-Appellee.

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*Honorable Charles H. Tenney, of the United States District Court of the Southern District of New York, sitting by designation.

SYBIL YOUNG and RODERICK YOUNG,

Plaintiffs-Appellants,

- against -

CHEMICAL BANK, N.A.,

Defendant-Appellee.

Petitions for rehearing having been filled herein by Plaintiffs-Appellants in the above entitled matters,

UPON CONSIDERATION, it is ordered that said petitions for rehearing are DENIED.

IT IS FURTHER ORDERED that the opinion be amended in the following respects:

1. At *slip op. 4973*, *eliminate footnote 8* and the reference to it in the next to last line of the text.

2. *Re-number* all succeeding footnotes accordingly.

3. At *slip op. 4987*, *line 6*, insert the phrase "state law" immediately before the word "claims".

/s/Wilfred Feinberg
WILFRED FEINBERG

/s/ Jon O. Newman
JON O. NEWMAN
Circuit Judges

/s/ Charles H. Tenney
CHARLES H. TENNEY,
District Judge

UNITED STATES CODE, TITLE 12

§ 3401. Definitions

For the purpose of this chapter, the term—

(1) "financial institution" means any office of a bank, savings bank, card issuer as defined in section 1602(n) of Title 15, industrial loan company, trust company, savings and loan, building and loan, or homestead association (including cooperative banks), credit union, or consumer finance institution, located in any State or territory of the United States, the District of Columbia, Puerto Rico, Guam, American Samoa, or the Virgin Islands;

(2) "financial record" means an original of, a copy of, or information known to have been derived from, any record held by a financial institution pertaining to a customer's relationship with the financial institution;

(3) "Government authority" means any agency or department of the United States, or any officer, employee, or agent thereof;

(4) "person" means an individual or a partnership of five or fewer individuals;

(5) "customer" means any person or authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, in relation to an account maintained in the person's name;

(6) "supervisory agency" means, with respect to any particular financial institution any of the following which has statutory authority to examine the financial condition or business operations of that institution—

(A) the Federal Deposit Insurance Corporation;

(B) the Federal Savings and Loan Insurance Corporation;

(C) the Federal Home Loan Bank Board;

(D) the National Credit Union Administration;

(E) the Board of Governors of the Federal Reserve System;

(F) the Comptroller of the Currency;

(G) the Securities and Exchange Commission;

(H) the Secretary of the Treasury, with respect to the Bank Secrecy Act and the Currency and Foreign Transactions Reporting Act (Public Law 91-508, Title I and II); or

(I) any State banking or securities department or agency; and

(7) "law enforcement inquiry" means a lawful investigation or official proceeding inquiring into a violation of, or failure to comply with, any criminal or civil statute or any regulation, rule, or order issued pursuant thereto.

§ 3402. Access to financial records by Government authorities prohibited; exceptions

Except as provided by section 3403(c) or (d), 3413, or 3414 of this title, no Government authority may have access to or obtain copies of, or the information contained in the financial records of any customer from a financial institution unless the financial records are reasonably described and —

(1) such customer has authorized such disclosure in accordance with section 3404 of this title;

(2) such financial records are disclosed in response to an administrative subpena or summons which meets the requirements of section 3405 of this title;

(3) such financial records are disclosed in response to a search warrant which meets the requirements of section 3406 of this title;

(4) such financial records are disclosed in response to a judicial subpena which meets the requirements of section 3407 of this title; or

(5) such financial records are disclosed in response to a formal written request which meets the requriements of section 3408 of this title.

§ 3403. Confidentiality of financial records

Release of records by financial institutions prohibited

(a) No financial institution, or officer, employees, or agent of a financial institution, may provide to any Government authority access to or copies of, or the information contained in, the financial records of any customer except in accordance with the provisions of this chapter.

Release of records upon certification of compliance with chapter

(b) A financial institution shall not release the financial records of a customer until the Government authority seeking such records certifies in writing to the financial institution that it has complied with the applicable provisions of this chapter.

Notification to Government authority of existence of relevant information in records; scope of disclosure; liability for disclosure

(c) Nothing in this chapter shall preclude any financial institution, or any officer, employee, or agent of a financial institution, from notifying a Government authority that such institution, or officer, employee, or agent has information which may be relevant to a possible violation of any statute or regulation. Such information may include only the name or other identifying information concerning any individual, corporation, or account involved in and the nature of any suspected illegal activity. Such information may be disclosed notwithstanding any constitution, law, or regulation of any State or political subdivision thereof to the contrary. Any financial institution, or officer, employee, or agent thereof, making a disclosure of information pursuant to this subsection, shall not be liable to the customer under any law or regulation of the United States or any constitution, law, or regulation of any State or political subdivision thereof, for such disclosure or for any failure to notify the customer of such disclosure.

Release of records as incident to perfection of security interest, proving claim in bankruptcy, collecting debt, or processing application with regard to Government loan, loan guarantee, etc.

(d)(1) Nothing in this chapter shall preclude a financial institution, as an incident to perfecting a security interest, proving a claim in bankruptcy, or otherwise collecting on a debt owing either to the financial institution itself or in its role as a fiduciary, from providing copies of any financial record to any court or Government authority.

(2) Nothing in this chapter shall preclude a financial institution, as an incident to processing an application for assistance to a customer in the form of a Government loan, loan guaranty, or loan insurance agreement, or as an incident to processing a default on, or administering, a Government

guaranteed or insured loan, from initiating contact with an appropriate Government authority for the purpose of providing any financial record necessary to permit such authority to carry out its responsibilities under a loan, loan guaranty, or loan insurance agreement.

§ 3404. Customer authorizations

Statement furnished by customer to financial institution and Government authority; contents

(a) A customer may authorize disclosure under section 3402 of this title if he furnishes to the financial institution and to the Government authority seeking to obtain such disclosure a signed and dated statement which—

(1) authorizes such disclosure for a period not in excess of three months;

(2) states that the customer may revoke such authorization at any time before the financial records are disclosed;

(3) identifies the financial records which are authorized to be disclosed;

(4) specifies the purposes for which, and the Government authority to which, such records may be disclosed; and

(5) states the customer's rights under this chapter.

Authorization as condition of doing business prohibited

(b) No such authorization shall be required as a condition of doing business with any financial institution.

Right of customer to access to financial institution's record of disclosures

(c) The customer has the right, unless the Government authority obtains a court order as provided in section 3409 of this title, to obtain a copy of the record which the financial institution shall keep of all instances in which the customer's record is disclosed to a Government authority pursuant to this section, including the identity of the Government authority to which such disclosure is made.

§ 3405. Administrative subpena and summons

A Government authority may obtain financial records under section 3402(2) of this title pursuant to an administrative subpena or summons otherwise authorized by law only if—

(1) there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry;

(2) a copy of the subpena or summons has been served upon the customer or mailed to his last known address on or before the date on which the subpena or summons was served on the financial institution together with the following notice which shall state with reasonable specificity the nature of the law enforcement inquiry:

"Records or information concerning your transactions held by the financial institution named in the attached subpena or summons are being sought by this (agency or department) in accordance with the Right to Financial Privacy Act of 1978 for the following purpose: If you desire that such records or information not be made available, you must:

"1. Fill out the accompanying motion paper and sworn statement or write one of your own, stating that you are the customer whose records

are being requested by the Government and either giving the reasons you believe that the records are not relevant to the legitimate law enforcement inquiry stated in this notice or any other legal basis for objecting to the release of the records.

"2. File the motion and statement by mailing or delivering them to the clerk of any one of the following United States district courts:

"3. Serve the Government authority requesting the records by mailing or delivering a copy of your motion and statement to

"4. Be prepared to come to court and present your position in further detail.

"5. You do not need to have a lawyer, although you may wish to employ one to represent you and protect your rights.

If you do not follow the above procedures, upon the expiration of ten days from the date of service or fourteen days from the date of mailing of this notice, the records or information requested therein will be made available. These records may be transferred to other Government authorities for legitimate law enforcement inquiries, in which event you will be notified after the transfer."; and

(3) ten days have expired from the date of service of the notice or fourteen days have expired from the date of mailing the notice to the customer and within such time period the customer has not filed a sworn statement and motion to quash in an appropriate court, or the customer challenge provisions of section 3410 of this title have been complied with.

§ 3406. Search warrants

Applicability of Federal Rules of Criminal Procedure

(a) A Government authority may obtain financial records under section 3402 of this title only if it obtains a search warrant pursuant to the Federal Rules of Criminal Procedure.

Mailing of copy and notice to customer

(b) No later than ninety days after the Government authority serves the search warrant, it shall mail to the customer's last known address a copy of the search warrant together with the following notice:

"Records or information concerning your transactions held by the financial institution named in the attached search warrant were obtained by this (agency or department) on (date) for the following purpose: . You may have rights under the Right to Financial Privacy Act of 1978.".

Court-ordered delays in mailing

(c) Upon application of the Government authority, a court may grant a delay in the mailing of the notice required in subsection (b) of this section, which delay shall not exceed one hundred and eighty days following the service of the warrant, if the court makes the findings required in section 3409(a) of this title. If the court so finds, it shall enter an ex parte order granting the requested delay and an order prohibiting the financial institution from disclosing that records have been obtained or that a search warrant for such records has been executed. Additional delays of up to ninety days may be granted by the court upon application, but only in accordance with this subsection. Upon expiration of the period of delay of notification of the customer, the

following notice shall be mailed to the customer along with a copy of the search warrant:

"Records or information concerning your transactions held by the financial institution named in the attached search warrant were obtained by this (agency or department) on (date). Notification was delayed beyond the statutory ninety-day delay period pursuant to a determination by the court that such notice would seriously jeopardize an investigation concerning . You may have rights under the Right to Financial Privacy Act of 1978.".

§ 3407. Judicial subpena

A Government authority may obtain financial records under section 3402 of this title pursuant to judicial subpena only if—

(1) such subpena is authorized by law and there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry;

(2) a copy of the subpena has been served upon the customer or mailed to his last known address on or before the date on which the subpena was served on the financial institution together with the following notice which shall state with reasonable specificity the nature of the law enforcement inquiry:

"Records or information concerning your transactions which are held by the financial institution named in the attached subpena are being sought by this (agency or department or authority) in accordance with the Right to Financial Privacy Act of 1978 for the following purpose: If you desire that such records or information not be made available, you must:

"1. Fill out the accompanying motion paper and sworn statement or write one of your own, stating that you are the customer whose records are being requested by the Government and either giving the reasons you believe that the records are not relevant to the legitimate law enforcement inquiry stated in this notice or any other legal basis for objecting to the release of the records.

"2. File the motion and statement by mailing or delivering them to the clerk of the Court.

"3. Serve the Government authority requesting the records by mailing or delivering a copy of your motion and statement to

"4. Be prepared to come to court and present your position in further detail.

"5. You do not need to have a lawyer, although you may wish to employ one to represent you and protect your rights.

If you do not follow the above procedures, upon the expiration of ten days from the date of service or fourteen days from the date of mailing of this notice, the records or information requested therein will be made available. These records may be transferred to other government authorities for legitimate law enforcement inquiries, in which event you will be notified after the transfer;" and

(3) ten days have expired from the date of service or fourteen days from the date of mailing of the notice to the customer and within such time period the customer has not filed a sworn statement and motion to quash in an appropriate court, or the customer challenge provisions of section 3410 of this title have been complied with.

§ 3408. Formal written request

A Government authority may request financial records under section 3402(5) of this title pursuant to a formal written request only if—

(1) no administrative summons or subpena authority reasonably appears to be available to that Government authority to obtain financial records for the purpose for which such records are sought;

(2) the request is authorized by regulations promulgated by the head of the agency or department;

(3) there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry; and

(4) (A) a copy of the request has been served upon the customer or mailed to his last known address on or before the date on which the request was made to the financial institution together with the following notice which shall state with reasonable specificity the nature of the law enforcement inquiry:

"Records or information concerning your transactions held by the financial institution named in the attached request are being sought by this (agency or department) in accordance with the Right to Financial Privacy Act of 1978 for the following purpose:

"If you desire that such records or information not be made available, you must:

"1. Fill out the accompanying motion paper and sworn statement or write one of your own, stating that you are the customer whose records are being requested by the Government and either

giving the reasons you believe that the records are not relevant to the legitimate law enforcement inquiry stated in this notice or any other legal basis for objecting to the release of the records.

"2. File the motion and statement by mailing or delivering them to the clerk of any one of the following United States District Courts:

"3. Serve the Government authority requesting the records by mailing or delivering a copy of your motion and statement to

"4. Be prepared to come to court and present your position in further detail.

"5. You do not need to have a lawyer, although you may wish to employ one to represent you and protect your rights.

If you do not follow the above procedures, upon the expiration of ten days from the date of service or fourteen days from the date of mailing of this notice, the records or information requested therein may be made available. These records may be transferred to other Government authorities for legitimate law enforcement inquiries, in which event you will be notified after the transfer;" and

(B) ten days have expired from the date of service or fourteen days from the date of mailing of the notice by the customer and within such time period the customer has not filed a sworn statement and an application to enjoin the Government authority in an appropriate court, or the customer challenge provisions of section 3410 of this title have been complied with.

§ 3409. Delayed notice

Application by Government authority; findings

(a) Upon application of the Government authority, the customer notice required under section 3404(c), 3405(2), 3406(c), 3407(2), 3408(4), or 3412(b) of this title may be delayed by order of an appropriate court if the presiding judge or magistrate finds that—

(1) the investigation being conducted is within the lawful jurisdiction of the Government authority seeking the financial records;

(2) there is reason to believe that the records being sought are relevant to a legitimate law enforcement inquiry; and

(3) there is reason to believe that such notice will result in—

(A) endangering life or physical safety of any person;

(B) flight from prosecution;

(C) destruction of or tampering with evidence;

(D) intimidation of potential witnesses; or

(E) otherwise seriously jeopardizing an investigation or official proceeding or unduly delaying a trial or ongoing official proceeding to the same extent as the circumstances in the preceeding subparagraphs.

An application for delay must be made with reasonable specificity.

Grant of delay order; duration and specifications; extension; copy of extensions; request and notice to customer

(b)(1) If the court makes the findings required in paragraphs (1), (2), and (3) of subsection (a) of this section, it shall enter an ex parte order granting the requested delay for a period not to exceed ninety days and an order prohibiting the financial institution from disclosing that records have been obtained or that a request for records has been made, except that, if the records have been sought by a Government authority exercising financial controls over foreign accounts in the United States under section 5(b) of the Trading with the Enemy Act, the International Emergency Economic Powers Act (Title II, Public Law 95-223), or section 287c of Title 22, and the court finds that there is reason to believe that such notice may endanger the lives or physical safety of a customer or group of customers, or any person or group of persons associated with a customer, the court may specify that the delay be indefinite.

(2) Extensions of the delay of notice provided in paragraph (1) of up to ninety days each may be granted by the court upon application, but only in accordance with the subsection.

(3) Upon expiration of the period of delay of notification under paragraph (1) or (2), the customer shall be served with or mailed a copy of the process or request together with the following notice which shall state with reasonable specificity the nature of the law enforcement inquiry:

"Records or information concerning your transactions which are held by the financial institution named in the attached process or request were supplied to or requested by the Government authority named in the process or request on (date). Notification was withheld pursuant to a determination by the (title of court so ordering) under the Right to Financial Privacy Act of 1978 that such notice might (state reason). The purpose of the investigation or official proceeding was .".

Notice requirement respecting emergency access to financial records

(c) When access to financial records is obtained pursuant to section 3414(b) of this title (emergency access), the Government authority shall, unless a court has authorized delay of notice pursuant to subsections (a) and (b) of this section, as soon as practicable after such records are obtained serve upon the customer, or mail by registered or certified mail to his last known address, a copy of the request to the financial institution together with the following notice which shall state with reasonable specificity the nature of the law enforcement inquiry:

"Records concerning your transactions held by the financial institution named in the attached request were obtained by (agency or department) under the Right to Financial Privacy Act of 1978 on (date) for the following purpose: Emergency access to such records was obtained on the grounds that (state grounds).".

Preservation of memorandums, affidavits, or other papers

(d) Any memorandum, affidavit, or other paper filed in connection with a request for delay in notification shall be preserved by the court. Upon petition by the customer to whom such records pertain, the court may order disclosure of such papers to the petitioner unless the court makes the findings required in subsection (a) of this section.

§ 3410. Customer challenges

Filing of motion to quash or application to enjoin; proper court; contents

(a) Within ten days of service or within fourteen days of mailing of a subpena, summons, or formal written request, a customer may file a motion to quash an administrative

summons or judicial subpena, or an application to enjoin a Government authority from obtaining financial records pursuant to a formal written request, with copies served upon the Government authority. A motion to quash a judicial subpena shall be filed in the court which issued the subpena. A motion to quash an administrative summons or an application to enjoin a Government authority from obtaining records pursuant to a formal written request shall be filed in the appropriate United States district court. Such motion or application shall contain an affidavit or sworn statement—

> (1) stating that the applicant is a customer of the financial institution from which financial records pertaining to him have been sought; and
>
> (2) stating the applicant's reasons for believing that the financial records sought are not relevant to the legitimate law enforcement inquiry stated by the Government authority in its notice, or that there has not been substantial compliance with the provisions of this chapter.

Service shall be made under this section upon a Government authority by delivering or mailing by registered or certified mail a copy of the papers to the person, office, or department specified in the notice which the customer has received pursuant to this chapter. For the purposes of this section, "delivery" has the meaning stated in rule 5(b) of the Federal Rules of Civil Procedure.

Filing of response; additional proceedings

(b) If the court finds that the customer has complied with subsection (a) of this section, it shall order the Government authority to file a sworn response, which may be filed in camera if the Government includes in its response the reasons which make in camera review appropriate. If the court is unable to determine the motion or application on the basis of the parties' initial allegations and response, the court may conduct such additional proceedings as it deems appropriate.

All such proceedings shall be completed and the motion or application decided within seven calendar days of the filing of the Government's response.

Decision of court

(c) If the court finds that the applicant is not the customer to whom the financial records sought by the Government authority pertain, or that there is a demonstrable reason to believe that the law enforcement inquiry is legitimate and a reasonable belief that the records sought are relevant to that inquiry, it shall deny the motion or application, and, in the case of an administrative summons or court order other than a search warrant, order such process enforced. If the court finds that the applicant is the customer to whom the records sought by the Government authority pertain, and that there is not a demonstrable reason to believe that the law enforcement inquiry is legitimate and a reasonable belief that the records sought are relevant to that inquiry, or that there has not been substantial compliance with the provisions of this chapter, it shall order the process quashed or shall enjoin the Government authority's formal written request.

Appeals

(d) A court ruling denying a motion or application under this section shall not be deemed a final order and no interlocutory appeal may be taken therefrom by the customer. An appeal of a ruling denying a motion or application under this section may be taken by the customer (1) within such period of time as provided by law as part of any appeal from a final order in any legal proceeding initiated against him arising out of or based upon the financial records, or (2) within thirty days after a notification that no legal proceeding is contemplated against him. The Government authority obtaining the financial records shall promptly notify a customer when a determination has been made that no legal proceeding against him is contemplated. After one hundred and eighty days from the denial of the motion or application, if the Government authority obtaining the records has not initiated

such a proceeding, a supervisory official of the Government authority shall certify to the appropriate court that no such determination has been made. The court may require that such certifications be made, at reasonable intervals thereafter, until either notification to the customer has occurred or a legal proceeding is initiated as described in clause (A).

Sole judicial remedy available to customer

(e) The challenge procedures of this chapter constitute the sole judicial remedy available to a customer to oppose disclosure of financial records pursuant to this chapter.

Effect on challenges by financial institutions

(f) Nothing in this chapter shall enlarge or restrict any rights of a financial institution to challenge requests for records made by a Government authority under existing law. Nothing in this chapter shall entitle a customer to assert the rights of a financial institution.

§ 3411. Duty of financial institutions

Upon receipt of a request for financial records made by a Government authority under section 3405 or 3407 of this title, the financial institution shall, unless otherwise provided by law, proceed to assemble the records requested and must be prepared to deliver the records to the Government authority upon receipt of the certificate required under section 3403(b) of this title.

§ 3412. Use of information

Transfer of financial records to other agencies or departments; certification

(a) Financial records originally obtained pursuant to this chapter shall not be transferred to another agency or department

unless the transferring agency or department certifies in writing that there is reason to believe that the records are relevant to a legitimate law enforcement inquiry within the jurisdiction of the receiving agency or department.

Mailing of copy of certification and notice to customer

(b) When financial records subject to this chapter are transferred pursuant to subsection (a) of this section, the transferring agency or department shall, within fourteen days, send to the customer a copy of the certification made pursuant to subsection (a) of this section and the following notice, which shall state the nature of the law enforcement inquiry with reasonable specificity: "Copies of, or information contained in, your financial records lawfully in possession of have been furnished to pursuant to the Right of Financial Privacy Act of 1978 for the following purpose: . If you believe that this transfer has not been made to further a legitimate law enforcement inquiry, you may have legal rights under the Financial Privacy Act of 1978 or the Privacy Act of 1974."

Court-ordered delays in mailing

(c) Notwithstanding subsection (b) of this section, notice to the customer may be delayed if the transferring agency or department has obtained a court order delaying notice pursuant to section 3409(a) and (b) of this title and that order is still in effect, or if the receiving agency or department obtains a court order authorizing a delay in notice pursuant to section 3409(a) and (b) of this title. Upon the expiration of any such period of delay, the transferring agency or department shall serve to the customer the notice specified in subsection (b) of this section and the agency or department that obtained the court order authorizing a delay in notice pursuant to section 3409(a) and (b) of this title shall serve to the customer the notice specified in section 3409(b) of this title.

Exchanges of examination reports by supervisory agencies; transfer of financial records to defend customer action; withholding of information

(d) Nothing in this chapter prohibits any supervisory agency from exchanging examination reports or other information with another supervisory agency. Nothing in this chapter prohibits the transfer of a customer's financial records needed by counsel for a Government authority to defend an action brought by the customer. Nothing in this chapter shall authorize the withholding of information by any officer or employee of a supervisory agency from a duly authorized committee or subcommittee of the Congress.

Federal Financial Institutions Examination Council supervisory agencies; authorization of exchange of financial records or other information

(e) Notwithstanding section 3401(6) of this title or any other provision of this chapter, the exchange of financial records or other information with respect to a financial institution among and between the five member supervisory agencies of the Federal Financial Institutions Examination Council is permitted.

Transfer to attorney general

(f)(1) Nothing in this chapter shall apply when financial records obtained by an agency or department of the United States are disclosed or transferred to the Attorney General upon the certification by a supervisory level official of the transferring agency or department that—

(A) there is reason to believe that the records may be relevant to a violation of Federal criminal law; and

(B) the records were obtained in the exercise of the agency's or department's supervisory or regulatory functions.

(2) Limitation on use

Records so transferred shall be used only for criminal investigative or prosecutive purposes by the Department of Justice and shall, upon completion of the investigation or prosecution (including any appeal), be returned only to the transferring agency or department.

§ 3413. Exceptions

Disclosure of financial records not identified with particular customers

(a) Nothing in this chapter prohibits the disclosure of any financial records or information which is not identified with or identifiable as being derived from the financial records of a particular customer.

Disclosure pursuant to exercise of supervisory, regulatory, or monetary functions of financial institutions

(b) Nothing in this chapter prohibits examination by or disclosure to any supervisory agency of financial records or information in the exercise of its supervisory, regulatory, or monetary functions with respect to a financial institution.

Disclosure pursuant to Internal Revenue Code

(c) Nothing in this chapter prohibits the disclosure of financial records in accordance with procedures authorized by the Internal Revenue Code.

Disclosure pursuant to Federal statute or rule promulgated thereunder

(d) Nothing in this chapter shall authorize the withholding of financial records or information required to be reported in accordance with any Federal statute or rule promulgated thereunder.

Disclosure pursuant to Federal Rules of Civil or Criminal Procedure or comparable rules of other courts

(e) Nothing in this chapter shall apply when financial records are sought by a Government authority under the Federal Rules of Civil or Criminal Procedure or comparable rules of other courts in connection with litigation to which the Government authority and the customer are parties.

Disclosure pursuant to administrative subpena issued by administrative law judge

(f) Nothing in this chapter shall apply when financial records are sought by a government authority pursuant to an administrative subpoena issued by an administrative law judge in an adjudicatory proceeding subject to section 554 of Title 5, and to which the Government authority and the customer are parties.

Disclosure pursuant to legitimate law enforcement inquiry respecting name, address, account number, and type of account of particular customers

(g) The notice requirements of this chapter and sections 3410 and 3412 of this title shall not apply when a Government authority by a means described in section 3402 of this title and for a legitimate law enforcement inquiry is seeking only the name, address, account number, and type of account of any customer or ascertainable group of customers associated (1) with a financial transaction or class of financial transactions, or (2) with a foreign country or subdivision thereof in the case of a Government authority exercising financial controls over foreign accounts in the United States under section 5(b) of the Trading with the Enemy Act; the International Emergency Economic Powers Act (Title II, Public Law 95-223); or section 287c of Title 22.

Disclosure pursuant to lawful proceeding, investigation, etc., directed at financial institution or legal entity or consideration or administration respecting Government loans, loan guarantees, etc.

(h) (1) Nothing in this chapter (except sections 3403, 3417 and 3418 of this title) shall apply when financial records are sought by a Government authority—

(A) in connection with a lawful proceeding, investigation, examination, or inspection directed at the financial institution in possession of such records or at a legal entity which is not a customer; or

(B) in connection with the authority's consideration or administration of assistance to the customer in the form of a Government loan, loan guaranty, or loan insurance program.

(2) When financial records are sought pursuant to this subsection, the Government authority shall submit to the financial institution the certificate required by section 3403(b) of this title. For access pursuant to paragraph (1)(B), no further certification shall be required for subsequent access by the certifying government authority during the term of the loan, loan guaranty, or loan insurance agreement.

(3) After the effective date of this chapter, whenever a customer applies for participation in a Government loan, loan guaranty, or loan insurance program, the Government authority administering such program shall give the customer written notice of the authority's access rights under this subsection. No further notification shall be required for subsequent access by that authority during the term of the loan, loan guaranty, or loan insurance agreement.

(4) Financial records obtained pursuant to this subsection may be used only for the purpose for which they were originally obtained, and may be transferred to another agency or department only when the transfer is to facilitate a lawful proceeding, investigation, examination, or inspection directed at the financial institution in possession of such records, or at a legal entity which is not a customer, except that—

(A) nothing in this paragraph prohibits the use or transfer of a customer's financial records needed by counsel representing a Government authority in a civil action arising from a Government loan, loan guaranty, or loan insurance agreement; and

(B) nothing in this paragraph prohibits a Government authority providing assistance to a customer in the form of a loan, loan guaranty, or loan insurance agreement from using or transferring financial records necessary to process, service or foreclose a loan, or to collect on an indebtedness to the government resulting from a customer's default.

(5) Notification that financial records obtained pursuant to this subsection may relate to a potential civil, criminal, or regulatory violation by a customer may be given to an agency or department with jurisdiction over that violation, and such agency or department may then seek access to the records pursuant to the provisions of this chapter.

(6) Each financial institution shall keep a notation of each disclosure made pursuant to paragraph (1) (B) of this subsection, including the date of such disclosure and the Government authority to which it was made. The customer shall be entitled to inspect this information.

Disclosure pursuant to issuance of subpena or court order respecting grand jury proceeding

(i) Nothing in this chapter (except sections 3415 and 3420 of this title) shall apply to any subpena or court order issued in connection with proceedings before a grand jury, except that a court shall have authority to order a financial institution, on which a grand jury subpoena for customer records has been served, not to notify the customer of the existence of the subpoena or information that has been furnished to the grand jury, under the circumstances and for the period specified and pursuant to the procedures established in section 3409 of this title.

Disclosure pursuant to proceeding, investigation, etc., instituted by General Accounting Office and directed at government authority

(j) This chapter shall not apply when financial records are sought by the General Accounting Office pursuant to an authorized proceeding, investigation, examination or audit directed at a government authority.

Disclosure necessary for proper administration of programs of withholding taxes on nonresident aliens, Federal Old-Age, Survivors, and Disability insurance Benefits, and Railroad Retirement Act Benefits

(k)(1) Nothing in this chapter shall apply to the disclosure by the financial institution of the name and address of any customer to the Department of the Treasury, the Social Security Administration, or the Railroad Retirement Board, where the disclosure of such information is necessary to, and such information is used solely for the purpose of, the proper administration of section 1441 of Title 26, title II of the Social Security Act [42 U.S.C.A. § 401 et seq.], or the Railroad Retirement Act of 1974 [45 U.S.C.A. § 228a et seq.].

(2) Notwithstanding any other provision of law, any request authorized by paragraph (1) (and the information contained therein) may be used by the financial institution or its agents solely for the purpose of providing the customer's name and address to the Department of the Treasury, the Social Security Administration, or the Railroad Retirement Board and shall be barred from redisclosure by the financial institution or its agents.

Crimes against financial institutions by insiders

(l) Nothing in this chapter shall apply when any financial institution or supervisory agency provides any financial record of any officer, director, employee, or controlling shareholder (within the meaning of subparagraph (A) or (B) of section 1841(a)(2) of this title or subparagraph (A) or (B) of section 1730a(a)(2) of this title) of such institution, or of any major borrower from such institution who there is reason to believe may be acting in concert with any such officer, director, employee, or controlling shareholder, to the Attorney General of the United States, to a State law enforcement agency, or, in

the case of a possible violation of subchapter II of chapter 53 of Title 31, to the Secretary of the Treasury if there is reason to believe that such record is relevant to a possible violation by such person of—

(1) any law relating to crimes against financial institutions or supervisory agencies by directors, officers, employees, or controlling shareholders of, or by borrowers from, financial institutions; or

(2) any provision of subchapter II of chapter 53 of Title 31.

§ 3414. Special procedures

(a) (1) Nothing in this chapter (except sections 3415, 3417, 3418, and 3421 of this title) shall apply to the production and disclosure of financial records pursuant to requests from—

(A) a Government authority authorized to conduct foreign counter—or foreign positive-intelligence activities for purposes of conducting such activities; or

(B) the Secret Service for the purpose of conducting its protective functions (18 U.S.C. 3056; 3 U.S.C. 202, Public Law 90—331, as amended).

(2) In the instances specified in paragraph (1), the Government authority shall submit to the financial institution the certificate required in section 3403(b) of this title signed by a supervisory official of a rank designated by the head of the Government authority.

(3) No financial institution, or officer, employee, or agent of such institution, shall disclose to any person that a Government authority described in paragraph (1) has sought or obtained access to a customer's financial records.

(4) The Government authority specified in paragraph (1) shall compile an annual tabulation of the occasions in which this section was used.

(5) (A) Financial institution, and officers, employees, and agents thereof, shall comply with a request for a customer's or entity's financial records made pursuant to this subsection by the Federal Bureau of Investigation when the Director of the Federal Bureau of Investigation (or the Director's designee) certifies in writing to the financial institution that such records are sought for foreign counterintelligence purposes and that there are specific and articulable facts giving reason to believe that the customer or entity whose records are sought is a foreign power or an agent of a foreign power as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801).

(B) The federal Bureau of Investigation may disseminate information obtained pursuant to this paragraph only as provided in guidelines approved by the Attorney General for foreign intelligence collection and foreign counterintelligence investigations conducted by the Federal Bureau of Investigation, and, with respect to dissemination to an agency of the United States, only if such information is clearly relevant to the authorized responsibilities of such agency.

(C) On a semiannual basis the Attorney General shall fully inform the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate concerning all requests made pursuant to this paragraph.

(D) No financial institution, or officer, employee, or agent of such institution, shall disclose to any person that the Federal Bureau of Investigation has sought or obtained access to a customer's or entity's financial records under this paragraph.

(b) (1) Nothing in this chapter shall prohibit a Government authority from obtaining financial records from a financial

institution if the Government authority determines that delay in obtaining access to such records would create imminent danger of—

(A) physical injury to any person;
(B) serious property damage; or
(C) flight to avoid prosecution.

(2) In the instances specified in paragraph (1), the Government shall submit to the financial institution the certificate required in section 3403(b) of this title signed by a supervisory official of a rank designated by the head of the Government authority.

(3) Within five days of obtaining access to financial records under this subsection, the Government authority shall file with the appropriate court a signed, sworn statement of a supervisory official of a rank designated by the head of the Government authority setting forth the grounds for the emergency access. The Government authority shall thereafter comply with the notice provisions of section 3409(c) of this title.

(4) The Government authority specified in paragraph (1) shall compile an annual tabulation of the occasions in which this section was used.

§ 3415. Cost reimbursement

Except for records obtained pursuant to section 3403(d) or 3413(a) through (h) of this title, or as otherwise provided by law, a Government authority shall pay to the financial institution assembling or providing financial records pertaining to a customer and in accordance with procedures established by this chapter a fee for reimbursement for such costs as are reasonably necessary and which have been directly incurred in searching for, reproducing, or transporting books, papers, records, or other data required or requested to be produced. The Board of Governors of the Federal Reserve System shall,

by regulation, establish the rates and conditions under which such payment may be made.

§ 3416. Jurisdiction

An action to enforce any provision of this chapter may be brought in any appropriate United State district court without regard to the amount in controversy within three years from the date on which the violation occurs or the date of discovery of such violation, whichever is later.

§ 3417. Civil penalties

Liability of agencies or departments of United States or financial institutions

(a) Any agency or department of the United States or financial institution obtaining or disclosing financial records or information contained therein in violation of this chapter is liable to the customer to whom such records relate in an amount equal to the sum of —

(1) $100 without regard to the volume of records involved;

(2) any actual damages sustained by the customer as a result of the disclosure;

(3) such punitive damages as the court may allow, where the violation is found to have been willful or intentional; and

(4) in the case of any successful action to enforce liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

Disciplinary action for willful or intentional violation of chapter by agents or employees of department or agency

(b) Whenever the court determines that any agency or department of the United States has violated any provision of this chapter and the court finds that the circumstances surrounding the violation raise questions of whether an officer or employee of the department or agency acted willfully or intentionally with respect to the violation, the Office of Personnel Management shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the agent or employee who was primarily responsible for the violation. The Office after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Office recommends.

Good faith defense

(c) Any financial institution or agent or employee thereof making a disclosure of financial records pursuant to this chapter in good-faith reliance upon a certificate by any Government authority or pursuant to the provisions of section 1113(l) shall not be liable to the customer for such disclosure under this chapter, the constitution of any State, or any law or regulation of any State or any political subdivision of any State.

Exclusive judicial remedies and sanctions

(d) The remedies and sanctions described in this chapter shall be the only authorized judicial remedies and sanctions for violations of this chapter.

§ 3418. Injunctive relief

In addition to any other remedy contained in this chapter, injunctive relief shall be available to require that the procedures

of this chapter are complied with. In the event of any successful action, costs together with reasonable attorney's fees as determined by the court may be recovered.

§ 3419. Suspension of limitations

If any individual files a motion or application under this chapter which has the effect of delaying the access of a Government authority to financial records pertaining to such individual, any applicable statute of limitations shall be deemed to be tolled for the period extending from the date such motion or application was filed until the date upon which the motion or application is decided.

§ 3420. Grand jury information

Financial records about a customer obtained from a financial institution pursuant to a subpena issued under the authority of a Federal grand jury—

(1) shall be returned and actually presented to the grand jury, unless the volume of such records makes such return and actual presentation impractical in which case the grand jury shall be provided with a description of the contents of the records;

(2) shall be used only for the purpose of considering whether to issue an indictment or presentment by that grand jury, or of prosecuting a crime for which that indictment or presentment is issued, or for a purpose authorized by rule 6(e) of the Federal Rules of Criminal Procedure;

(3) shall be destroyed or returned to the financial institution if not used for one of the purposes specified in paragraph (2); and

(4) shall not be maintained, or a description of the contents of such records shall not be maintained by any Government authority other than in the sealed

records of the grand jury, unless such record has been used in the prosecution of a crime for which the grand jury issued an indictment or presentment or for a purpose authorized by rule 6(e) of the Federal Rules of Criminal Procedure.

§ 3421. Reporting requirements

(a) In April of each year, the Director of the Administrative Office of the United States Courts shall send to the appropriate committees of Congress a report concerning the number of applications for delays of notice made pursuant to section 3409 of this title and the number of customer challenges made pursuant to section 3410 of this title during the preceding calendar year. Such report shall include: the identity of the Government authority requesting a delay of notice; the number of notice delays sought and the number granted under each subparagraph of section 3409(a)(3) of this title; the number of notice delay extensions sought and the number granted; and the number of customer challenges made and the number that are successful.

(b) In April of each year, each Government authority that requests access to financial records of any customer from a financial institution pursuant to section 3404, 3405, 3406, 3407, 3408, 3409, or 3414 of this title shall send to the appropriate committees of Congress a report describing requests made during the preceding calendar year. Such report shall include the number of requests for records made pursuant to each section of this chapter listed in the preceding sentence and any other related information deemed relevant or useful by the Government authority.

§ 3422. Applicability to Securities and Exchange Commission

Except as provided in the Securities Exchange Act of 1934 [15 U.S.C.A. § 78a et seq.], this chapter shall apply with respect to the Securities and Exchange Commission.

UNITED STATES CODE, TITLE 28

§ 1782. Assistance to foreign and international tribunals and to litigants before such tribunals

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

(2)

Supreme Court, U.S.
FILED
DEC 28 1989
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CLERK

No. 89-862

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SYBIL YOUNG and RODERICK YOUNG,
Petitioners,

vs.

UNITED STATES DEPARTMENT OF JUSTICE,
Respondent.

SYBIL YOUNG and RODERICK YOUNG,
Petitioners,

vs.

CHEMICAL BANK, N.A.,
Respondent.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Counter-Statement Of Issues

I. WHETHER THE RIGHT TO FINANCIAL PRIVACY ACT APPLIES TO FEDERAL LAW-ENFORCEMENT OFFICIALS, WHO HAVE BEEN DESIGNATED AS COMMISSIONERS BY THE DISTRICT COURT PURSUANT TO ASSISTANCE TO FOREIGN TRIBUNALS AND LITIGANTS ACT, WHO ACTING AS MERE "CONDUITS" OBTAIN INFORMATION FROM THE BANK WITH A COURT-ORDERED SUBPOENA, AND WHO DO NOT CONDUCT ANY FEDERAL INVESTIGATION, AND, IF THE PRIVACY ACT APPLIES, MAY THE BANK BE FOUND LIABLE FOR VIOLATING THE PRIVACY ACT WHEN IT OBEYS SUCH COURT ORDER.

The District Court answered this question in the negative, and the Second Circuit Court of Appeals affirmed.

II. WHETHER RODERICK YOUNG LACKS STANDING TO ASSERT A CAUSE OF ACTION ARISING FROM THE PRIVACY ACT AS HE WAS NEITHER A CUSTOMER NOR REPRESENTATIVE AUTHORIZED BY THE BANK.

The District Court answered this question in the affirmative, and the Court of Appeals affirmed.

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List of Subsidiaries of Respondent

The following lists the wholly-owned subsidiaries of Chemical Banking Corporation ("CBC"), which are affiliates of Chemical Bank as of December 18, 1989. The subsidiaries of the first-tier CBC subsidiaries are indented. This list excludes certain non-publicly held subsidiaries and affiliates of CBC subsidiaries, of Chemical Bank, Texas Commerce Bancshares, Inc., Chemical New Jersey Holdings, Inc. that hold real or personal property acquired in satisfaction of debts. The excluded subsidiaries have been afforded confidentiality by federal regulatory agencies (such as the Federal Reserve Bank) and the New York State Department of Banking.

Bach Holding Corporation
Brown & Company Securities Corporation
CBC-USA, Inc.
Chatham Ventures, Inc.
Chemadvertising, Inc.
ChemSel, Inc.
Chemical Asset Management, Inc.
Chemical Bank
Chemical Bank & Trust Company of Florida, National Association
Chemical Bank, National Association
Chemical Business Credit Corp.
Chemical Equity Incorporated
  Chemical Venture Capital Corporation
Chemical First State Corporation
  Chemical Bank Delaware
    CBDC Corporation
    RBY, Inc.
  Chemical Connecticut Corporation
  Chemical Denver, Inc.
  Chemical (HVFLP) Inc.
Chemical Florida Banks, Inc.
Chemical Futures, Inc.
Chemical Futures Management, Inc.
Chemical International Securities Corp.
Chemical Investment Advisers, Inc.

Chemical Investment Group, Ltd., The
Chemical Investments, Inc.
Chemical Mortgage Company
Chemical Mortgage Securities, Inc.
Chemical New Jersey Corporation
Chemical New Jersey Holdings, Inc.
  Chemical Bank New Jersey, National Association
  Princeton Bank and Trust Company, National Association
  Chemical Trust Company of Florida, National Association
  Horizon Brokerage Services, Inc.
  Chemical Pennsylvania Corporation
Chemical New York, Inc.
Chemical New York - N.V.
Chemical Real Holdings, Inc.
Chemical Realty Corporation
  Side Corp.
Chemical Securities, Inc.
Chemical Technologies Corporation
  Pronto U.S.A., Inc.
  BankLink, Inc.
  Electronic Customer Services, Inc.
CT Holdings, Inc.
  Chemical Bank Texas, National Association
Investment and Capital Management Corp.
  Chemical Asset Management, Inc.
  Penmark Investments, Inc.
Offshore Equities
  The Andean Fund, Inc.
    Equifin
  Select Andean Holdings, Inc.
  Select Brazilian Holdings, Inc.
    Chempas Participacoes e Emprendementos Ltd.
  Select Life Holdings, Inc.
  Select Rio Grande Holdings, Inc.
  Select Southern Holdings, Inc.
  Sociedad Mexicana Para La Industria Y El Comercio S.A.
Portfolio Group, Inc., The
Pronto, Inc.
Quantum Investement Management, Inc.

Chemical Financial Services Corporation, Ltd.
- Chemical Card Services Corporation
- Chemical Financial Corporation (AZ)
- Chemical Financial Corporation (CA)
- Chemical Financial Corporation (FL)
- Chemical Financial Corporation (GA)
- Chemical Financial Corporation (IL)
- Chemical Financial Corporation (NC)
- Chemical Financial Corporation (PA)
- Chemical Financial Corporation (OK)
- Chemical Financial Corporation (TX)
- Chemical Financial Corporation (WA)
- Chemical Financial Services Corporation (CO)
- Chemical Financial Services Corporation (FL)
- Chemical Financial Services Corporation (GA)
- Chemical Financial Services Corporation (IN)
- Chemical Financial Services Corporation (KY)
- Chemical Financial Services Corporation (LA)
- Chemical Financial Services Corporation (NC)
- Chemical Financial Services Corporation (SC)
- Chemical Financial Services Corporation (TN)
- Chemical Financial Credit Services Corporation (KY)
- Chemical Financial Credit Services Corporation (TN)
- Sun States Life Insurance Company
- Great Lakes Insurance Company
- Lorry, Ltd.
- Chemical Student Services Corporation (CO)
- SFC Agency, Inc. (NY)
- Chemical Financial Investment Corporation
  - Chemical Financial Corporation (OH)
  - Chemical Financial Acceptance Corporation (OH)
  - Chemical Financial Services Corporation (OH)
  - Chemical Student Services Corporation (OH)
  - SFC Agency, Inc. (OH)

Texas Commerce Bancshares, Inc.
- Pyramid Agency, Inc.

Texas Commerce Information Systems, Inc.

Texas Commerce Bank Foundation, Inc.

Texas Commerce Funding Company

TexCom Venture Capital, Inc.
Texas Commerce Shareholders Company
  Gulf Building Corporation
Texas Commerce Services Company
Texas Commerce Bancshares Leasing Company
Texas Commerce Leasing Company
Texas Commerce Financial Services, Inc.
Texas Commerce Capital Markets, Inc.
  Texas Commerce Corporate Finance
  Texas Commerce Securities, Inc.
Texas Commerce Bank (Delaware)
Texas Commerce Mortgage Co.
Texas Commerce Investment Management Co.
Texas Commerce Bank - Amarillo
Texas Commerce Bank - Austin, N.A.
Texas Commerce Bank - Beaumont, N.A.
Texas Commerce Bank - Conroe, N.A.
Texas Commerce Bank - Corpus Christi
Texas Commerce Bank - Dallas, N.A.
Texas Commerce Bank - El Paso, N.A.
Texas Commerce Bank - Fort Worth
Texas Commerce Bank - Friendswood
Texas Commerce Bank - National Association, Lubbock
Texas Commerce Bank - McAllen, N.A.
Texas Commerce Bank - Midland, N.A.
The Stone Fort National Bank of Nacogdoches, Texas
Texas Commerce Bank - Odessa
Texas Commerce Bank - San Angelo, N.A.
Texas Commerce Bank - San Antonio
Texas Commerce Bank - Arlington
  Arlington State Corporation
  Texas Commerce Bank - Longview, N.A.
    5511 Incorporated
  Texas Commerce Bank - Rio Grande Valley
  Texas Commerce Bank - Sugar Land, N.A.
  Texas Commerce Trust Company of New York
  Texas Commerce Bank National Association, Houston
    TCB - Leasing Company
  Texas Commerce Commercial Leasing Company

Texas Commerce Equipment Leasing Company
Texas Commerce National Leasing Company
Texas Commerce International Leasing Company
Texas Commerce Investment Company
Watermill Ventures, Inc.

Chemical Bank ("CB") owns a fifty percent interest or more in the following subsidiaries. Subsidiaries of a CB subsidiary are indented.

Chemical Acceptance Corporation
Chemical Acceptance Corporation I
Chemical Mortgage Acceptance Corporation
Chemical Bank of Canada
Chemical Bank Canada Lease Inc.
Chemical Community Development, Inc.
Chemical International Finance, Ltd.
Chemco International, Inc.
Chemical Videotex Services, Inc.
Chemgraphics Systems, Inc.
ChemLease Worldwide, Inc.
ChemNetwork Processing Services, Inc.
Chem Credit, Inc.

No. 89-862

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SYBIL YOUNG and RODERICK YOUNG,
Petitioners,

vs.

UNITED STATES DEPARTMENT OF JUSTICE
Respondent.

SYBIL YOUNG and RODERICK YOUNG,
Petitioners,

vs.

CHEMICAL BANK, N.A.,
Respondent.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Counter Statement of the Case

Petitioners, Sybil Young and Roderick Young, petition for *certiorari* from an order of the Court of Appeals for the Second Circuit, which affirmed the order of the District Court of the Southern District of New York, which denied their cross-motion for partial summary judgment pursuant to the Federal Rules of Civil Procedure ("FRCP") Rule 56, and granted the motion of Chemical Bank sued herein as Chemical Bank, N.A. ("Chemical" or "respondent") to dismiss the complaint for failure to state a claim on which relief may be granted pursuant to FRCP Rule 12(b), and which, on fact affidavits, petitioners allege was converted to summary judgment pursuant to FRCP Rule 56. Petitioners alleged in their cross-motion for summary judgment that there were no material disputed issues of fact.

The Second Circuit Court of Appeals made the narrow holding that the Right to Financial Privacy Act (the "Privacy Act") does not apply to court-appointed commissioners who would otherwise qualify as "government authorities" under the Privacy Act, when they seek information from financial institutions with court-ordered subpoenas. No other Circuit Court or state court has ever held to the contrary.

Petitioners seek damages in excess of $10,000,000 from Chemical on the theory that Chemical's compliance with a Court-ordered subpoena requiring it to produce testimony and bank records requested by the government of Bermuda lead to petitioners' convictions for violations of Bermuda's currency laws.

The lower courts properly held on these undisputed facts that the complaint failed to state a Privacy Act claim against Chemical. The subpoena issued by District Judge Charles E. Stewart, Jr. pursuant to which Chemical provided documents to representatives of the Bermudian government was on its face regular and proper and compelled Chemical's compliance. Moreover, the subpoena was directed to assist a prosecution of petitioners' criminal activities in Bermuda. It did not request information to assist a United States government investigation. The United States Attorney acted only as a Commissioner for the transmittal of information to Bermuda and at no time ever used any financial information produced by Chemical for any federal investigation.

The Privacy Act only limits the United States government's access to financial information; it does not repeal or impinge on the Assistance to Foreign and International Tribunals and to Litigants before such Tribunals Act ("Assistance to Foreign Tribunals and Litigants Act"), 28 U.S.C. § 1782. It is this latter Act which expressly authorized the Bank's conduct here.

The second cause of action on behalf of petitioner, Roderick Young ("Roderick"), also fails to aver a claim on which relief may be granted pursuant to the Privacy Act, because he neither

had an account with Chemical nor was he an authorized representative permitted to transact business with the Bank. Thus, since he is not a customer of this financial institution he lacks standing under the Privacy Act.

The complaint is premised on petitioners' claim that in committing scores of currency violations involving hundreds of thousands of dollars, petitioners had the right not to have Chemical disclose their criminal activities to anyone. Further, it is grounded on their assertion of the right to make Chemical a "silent partner" and unwilling participant in their crimes. This is not only outrageous, it also fails to state a claim for which any relief may be awarded against Chemical.

After the federal action was dismissed, petitioner, Sybil Young ("Sybil"), again sued Chemical in New York State Court for the very same financial disclosures alleging violations of her so-called common law privacy and confidentiality rights. Assuming that she has a legally cognizable claim, she may be afforded full relief for any alleged grievance in her State Court action. Intervention by this Court is neither necessary nor appropriate.

Counter Statement of Facts

In 1981, Sybil opened a checking account at Chemical in New York. JA 88 ¶ 7.[1] Roderick did not have either an account or fiduciary relationship with Chemical. JA 269 ¶ 2. He is not a representative authorized by Chemical to transact business with the Bank on behalf of Sybil. JA 269 ¶ 2. Sybil never advised Chemical that Roderick was authorized to transact business with Chemical on her behalf, nor did she file with the Bank the necessary power-of-attorney to permit him to act as her authorized representative. JA 269 ¶ 2.

Chemical refused to transact Bank business with Roderick. JA 269 ¶ 3. Sybil admits that Roderick attempted to deposit $35,000 in double endorsed travelers checks to her account on

[1] References to the Petition are noted as "Pet.", to the Petition's Appendix are noted as "A" and to the Joint Appendix are noted as "JA".

August 1, 1986, but that Chemical refused to accept this deposit and returned it. JA 287 ¶ 2. Roderick attempted to circumvent Bank policy by depositing these checks in an overnight deposit drop. Chemical once again refused to accept this transaction and returned these checks the same day to Sybil. JA 269 ¶ 2.

Chemical did not instigate Bermuda's investigation of petitioners, and there is absolutely no evidence in the record that Chemical was the source of a tip to the Bermuda authorities. Petitioners admit Chemical initially refused to cooperate with the Bermuda authorities and insisted that it receive a subpoena before it would disclose any information. Petitioners also expressly stated on the record they are "prepared to admit the assertions of fact contained in paragraph . . . 3 of Denton's Affirmation." JA 96 ¶ 21.[2] At paragraph 3 of Commissioner Denton's Affirmation he states:

> . . . [Attorney General] Froomkin said that he had contacted [Chemical Fraud Prevention Officer] O'Flaherty, who told him that the bank could not respond directly to a request from Bermuda authorities, and that the request would have to be made in a manner that could result in the issuance of a subpoena. Accordingly, Mr. Froomkin asked me if our Office could be of any assistance. See Exhibit C to Sybil Young Affidavit. JA 114-15 ¶ 3.

Petitioners admit that on or about January 30, 1987, the District Court issued a subpoena which required the production of records by Chemical (the "Subpoena"). They affirmatively admit the truth of the statements made by Mr. Denton at paragraph 13 of his Affirmation, JA 100 ¶ 33, where he states:

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[2] The Affidavit of Sybil Young in this action, sworn to February 29, 1988, in support of petitioners' cross motion against Chemical annexed and avowed the correctness of key portions of the Affirmations of Commissioner David Denton, sworn to February 5, 1988, and Douglas Schofield, an official of Bermuda, sworn to January 22, 1988, in support of the United States motion in the action of *Young v. United States Department of Justice*, 87 Civ. 8307 (JFK).

> The Deposition Subpoena was signed by the Hon. Charles E. Steward, Jr. on January 30, 1987. It *required Chemical Bank to produce the Youngs' bank records*. It also ordered . . . that Chemical Bank employees were not to disclose the existence of the subpoena except on further order of the Court. See Exhibit C to Sybil Young's Affidavit. [Emphasis added]. JA 117 ¶ 13.

Sybil further admits that only after receiving Attorney General Froomkin's request for Judicial Assistance in January 1987 did Mr. Denton contact Fraud Prevention Officer O'Flaherty of Chemical, and for the first time describe the documents that the Subpoena covered. JA 97 ¶ 24. Mr. Denton confirms that "as in this case" banks insist on a subpoena before delivering documents. JA 116-17 ¶¶ 9 and 10.

Petitioners do not contravert with personal knowledge that Chemical turned over documents and records only after it received the Subpoena (JA 118 ¶ 14), and Sybil admits that on the same day, February 4, 1987, that the documents were given to Commissioner Denton, he transmitted them to Bermuda. JA 98 ¶ 27.

Sybil states: "the Court had issued its order directing Chemical to delay any notice to me . . . ." JA 94 ¶ 16. In fact, the Court did more than direct Chemical to delay, it expressly prohibited Chemical from making any disclosure pending further order of the Court. JA 94 ¶ 16. Chemical obeyed this Court Order. JA 270 ¶ 6.

Sybil further states: "I am prepared to admit that [Chemical Officer] O'Flaherty informed Mr. Denton that Chemical would ordinarily disclose to a customer the fact that such an information request had been made absent an order of the Court requiring otherwise." JA 97 ¶ 26. Further, Sybil expressly admits:

> *I have no knowledge* whether Roderick or I were ever the subject of an investigation undertaken by the Department for its own purposes or whether any

> record or information relating to my accounts at Chemical, which Mr. Denton or Ms. Schofield obtained from Chemical, was used, or reviewed for potential use, by the Department for or in connection with any investigation by the Department for its own purposes. [Emphasis added].

JA 95 ¶ 18.

Commissioner Denton swore under oath that the information and records requested from Chemical were *not* used in connection with any investigation conducted by the government of the United States. JA 119 ¶ 19. Moreover, to Chemical's knowledge the information produced by it was not used by any United States government agency. JA 274 ¶ 18.

Petitioners confirm the noninvolvement of any federal agency when they assert that in April 1987 witness statements were taken directly by the government of Bermuda without even the attendance of Commissioner Denton, who merely arranged for their production but did not participate in any way in the investigation. JA 95 ¶ 19.

Moreover, Sybil admits:

> With respect to the assertions of fact contained in paragraph 19 of Mr. Denton's declaration, *I have no knowledge, one way or the other whether the Department or any other federal authority has even conducted an investigation of Roderick or me.* . . . I do not have any information, one way or the other, whether any documents contained in Mr. Denton's file have been referred to any federal agency . . . . [Emphasis added].

JA 99-100 ¶ 31. Similarly, she admits:

> With respect to paragraph 20 of Mr. Denton's declaration, *I do not have any information*, one way or the other, *whether any documents or testimony* produced

> in the proceeding referred to in Mr. Denton's declaration, whether pursuant to any order appointing him commissioner or otherwise, *have been used by the Department for any investigation*. [Emphasis added].

JA 100 ¶ 32.

* * *

> . . . I admit that the subpoena was obtained to assist an investigation by the Attorney General of Bermuda into assertedly criminal activities of Roderick and me . . . .

JA 101 ¶ 36.

Since petitioners admit that they have no knowledge that any United States agency conducted any investigation, *a fortiori*, it follows that petitioners set forth no evidence in the record that Chemical produced information and records pursuant to a United States government investigation. In fact, Chemical did not. JA 274 ¶ 18, 275 ¶ 22.

Roderick was arrested in May 1987. Sybil's arrest was delayed, as she initially opposed extradiction from England. In July, Chemical produced additional documents pursuant to the Subpoena. In August, appellants pled guilty to 47 counts of currency violations and of making false sworn statements. Sybil and Roderick Young were sentenced to up to 2 years in prison for each violation, and in the alternative, fines in the amounts of $775,000 and $184,500, respectfully, for their wilful violations of Bermuda's currency laws. JA 36 ¶ 5.

Argument

I

THE DISTRICT AND CIRCUIT COURTS CORRECTLY HELD THAT THE COMPLAINT FAILED TO AVER A CAUSE OF ACTION PURSUANT TO THE RIGHT TO FINANCIAL PRIVACY ACT

a. The Privacy Act Does Not Apply To Information Ordered Disclosed To Commissioners Appointed by the Court Pursuant to the Assistance to Foreign Tribunals and Litigants Act.

The Privacy Act provides no basis for any claim against Chemical. The Court held that Commissioner Denton was not an agent of a government authority within the meaning of the Privacy Act; accordingly, the protections of the Privacy Act were not triggered. A-7, 37. If the government employee is found to be exempt from the Privacy Act "then the disclosing financial institution is also excepted from the [Privacy] Act." *Raikos v. Bloomfield State Bank*, 703 F. Supp. 1365 n. 4 (S.D. Ind. 1989).

Section 3401(3) of the Privacy Act defines "governmental authority" as any agency or department of the United States, or any officer, employee or agent thereof. The Privacy Act does not apply to discovery requests made pursuant to 28 U.S.C. §1782 that originate from foreign governments. The Subpoena served upon Chemical, pursuant to which it disclosed information and account records relating to Sybil Young, was procured pursuant to 28 U.S.C. §1782, which relates to assistance to foreign and international tribunals and litigants. That section states in pertinent part:

> (a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the

> testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement . . . .

The Circuit Court held that the District Court that issued the Commission and the Subpoena was not a "government authority". A-36. *See Doe v. Board of Professional Responsibility of the District of Columbia Court of Appeals*, 717 F.2d 1424 (D.C. Cir. 1983). The Court of Appeals found that District Judge Stewart appointed Mr. Denton as a Commissioner to act simply as an arm of the Court, and it concluded that since the Court was not a "governmental authority" the Commissioners should be afforded the same treatment which the Court enjoys. A-36.

The Assistant United States Attorney, as the Commissioner appointed by the District Court pursuant to §1782, was merely a "conduit" to compel the production of documents and the taking of testimony to assist the request for information received from the Bermudian government regarding two of its residents. A-33, 34 and A- 5. *See e.g., Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, n.13 (1987) (the commissioner is a conduit for the receipt and transmission of requests.)

The United States Department of Justice did not conduct a law enforcement inquiry into the affairs of the Youngs. A-36, 48 and JA 120 ¶20. The Subpoena was directed against foreign residents in connection with a foreign investigation. The fact that a foreign government may have sought financial disclosures does not trigger the Privacy Act; it is only triggered when there exists a United States law enforcement inquiry. Thus, the disclosure of information falls outside the scope of the Privacy Act. As the Privacy Act does not apply, its protections are not triggered.[3]

---

[3] *Cf., Doe v. United States*, 860 F.2d 40 (2d Cir. 1988) (The protections and requirements of the Privacy Act and the Assistance to Foreign Tribunals and Litigants Act are exclusive of each other and are not over-lapping).

The Privacy Act is not a panacea meant to curtail the investigatory freedom of anyone other than the United States. By its express definition of government authority, the Privacy Act is inapplicable to state agencies or foreign governments. Privacy Act §3401. On its face, the Privacy Act does not apply to requests for judicial intervention by foreign tribunals and litigants, which are governed by 28 U.S.C. §1782 and are not federal government agents. Section 1782 was not repealed or otherwise modified by passage of the Privacy Act.

The precise issue under discussion was raised in *In Re Letter of Request for Judicial Assistance From the Tribunal Civil de Port-au- Prince, Republic of Haiti*, 669 F. Supp. 403 (S.D. Fla. 1987) ("*Port-au-Prince*"). In that case, a former Haitian government official moved to vacate an order appointing a commissioner pursuant to 28 U.S.C. §1782 and to quash a subpoena for his bank records in the United States issued by a federal court in connection with a criminal investigation conducted by a Haitian tribunal. The official alleged that the subpoena should be quashed because, *inter alia*, provisions of the Privacy Act had not been satisfied. The court summarily dismissed this argument:

> Nothing in the language or history of the Right to Financial Privacy Act shields Mercoron's [the official's] financial records from discovery requested pursuant to Section 1782. This Court will not extend the reach of the Right to Financial Privacy Act to requests that emanate from a foreign government. *Id.* at 407.

In *Republic of Haiti v. Crown Charters, Inc.*, 667 F. Supp. 839 (S.D. Fla. 1987), the District Court issued a subpoena pursuant to 28 U.S.C. §1782 and appointed the law firm of Stroock, Stroock and Lavan as Commissioner to compel such discovery. The Court in *Crown Charters* made clear that the commissioner acts as a representative of the foreign tribunal and not in its own individual capacity in compelling the production of testimony and documents.

> . . . One of the purposes of 28 U.S.C. §1782 is to permit the extension of assistance to foreign tribunals in

> resolving foreign disputes. *See In Re Letters Rogatory from the Tokyo District*, 539 F.2d 1216, 1218 (9th Cir. 1976). Although the statute vests the commissioner with limited judicial capacity such as the power to administer oaths, the commissioner's primary function is to represent the interests of Haiti in conducting the requested discovery. Thus, the Stroock firm is at all times an advocate for Haitian interests . . . .

667 F. Supp. at 848.

The District Court in *Crown Charters* did not superimpose the requirements of the Privacy Act on this commission. This is appropriate since it involved a foreign tribunal's resolution of a foreign dispute, facts virtually identical to those in this action, where the complaint acknowledges that petitioners are residents of Bermuda who were investigated (and ultimately prosecuted and convicted) by the Government of Bermuda. JA 144-46.

Petitioners cite two decisions in support of their strained view that Privacy Act protections should be superimposed upon §1782 commissions, one of which is an earlier decision from a district court of subordinate jurisdiction to the Second Circuit Court of Appeals and may no longer be good law if it is read as inconsistent with the Circuit Court's ruling in this case. Pet. 13. Petitioners rely exclusively on *In re Request For Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151, 1156 n.12 (11th Cir. 1988), *cert denied*, 109 S. Ct. 784 (1989), and *In re Request for International and Judicial Assistant (Letter Rogatory) from the Federative Republic of Brazil*, 700 F. Supp. 723, 725-26 (S.D.N.Y. 1988). The Circuit Court easily distinguished the holdings in these cases from the facts present here. It wrote that the footnote from *Trinidad and Tobago* relied on by petitioners, "in dictum, did no more than note that the Commissioner involved would comply with RFPA [Privacy Act]." The Second Circuit Court of Appeals observed that in the second case relied on by petitioners, *Republic of Brazil*, the issue was not central to the controversy before the court. It further noted

that, although the court in *Republic of Brazil* followed the dictum in *Trinidad and Tobago*, it was critical of the Eleventh Circuit's passing footnote reference to the Privacy Act as lacking any analysis. A-12, 13.

Moreover, the holding in *Republic of Brazil*, 687 F. Supp. 880, *stay lifted*, 700 F. Supp. 723 (S.D.N.Y. 1988), is really consistent with the narrow holding in this action. Discussing the disputed letters rogatory the court in *Republic of Brazil* found that District Judge Carter had appointed the United States Attorney, who was the actual prosecutor in the action, also to act as commissioner under the Assistance to Foreign Tribunals and Litigants Act, and this same prosecutor caused a grand jury subpoena to issue to the bank. In deciding the Privacy Act applied to the facts of the case before it, the court already had made quite clear in its prior decision that the United States Attorney had conducted and was continuing to conduct a federal investigation and prosecution of the bank's officers and customers. The court explained that "[t]his case has its genesis in a criminal prosecution in this District against . . . a Morgan officer [who] was convicted . . . ." 687 F. Supp. 880, and that it was "[a]gainst that background, the letters rogatory in dispute were issued." 687 F. Supp. 880.

Consistent with the facts in *Republic of Brazil* the District Court in the present action made the limited holding:

> The United States Attorney's Office has not conducted any independent investigation into the Young's affairs. See Denton Decl. ¶19. Thus, the Court must conclude that the Commissioners here were merely conduits of information and hence not subject to the Privacy Act.

A-48.

The complaint avered that the production of records and the taking of testimony pursuant to the Subpoena was at the request of an investigation conducted by the Bermudian government. JA 29 ¶20. *See also* JA-121-22. The United States Attorney's Office, in its capacity as Commissioner, was a "conduit" of information for the District Court pursuant to 28 U.S.C. §1782. JA 15. It was not conducting any investigation of its own. JA

120 ¶20. Accordingly, no claim for relief under the Privacy Act was stated, and neither the complaint nor the papers submitted in support of petitioner's cross-motion raised a single genuine issue of fact to preclude summary judgment.

The requirement of a "genuine" issue of fact means that the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Both lower courts correctly found that petitioners failed to raise a genuine issue. The language of Rule 56(a) mandated the entry of summary judgment against petitioners since they failed to make a showing sufficient to establish the existence of an element essential to their case and on which they bore the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). For such reason, the rulings of the courts below were correct, and *certiorari* should not be granted.

b. Chemical May Not Be Held Liable For Complying With a Court Order as § 3413(d) of the Privacy Act Exempts It from Liability.

Assuming *arguendo* that the Privacy Act were applicable to the disclosures made here, petitioners, nevertheless, still would fail to set forth a claim for relief. Petitioners admit:

> . . .[Attorney General] Froomkin said that he had contacted [Chemical Fraud Prevention Officer] O'Flaherty, who told him that the bank could not respond directly to a request from Bermuda authorities, and that the request would have to be made in a manner that could result in the issuance of a subpoena. Accordingly, Mr. Froomkin asked [Denton] if [his] Office could be of any assistance.

See JA 96 ¶21 (Sybil Young Aff. ¶21 admitting Denton's Affirmation at ¶3.)

Moreover, petitioners admit:

> The Deposition Subpoena was signed by the Hon. Charles E. Stewart, Jr. on January 30, 1987. *It required Chemical Bank to produce the Youngs' bank*

> *records*. It also ordered . . . that Chemical Bank employees were not to disclose the existence of the subpoena except on further order of the Court. [Emphasis added.]

See JA 100 (Sybil Young Aff. ¶33 admitting Denton's Affirmation at 13.)

The Subpoena contained a nondisclosure provision (a "gag" order), which prohibited Chemical from disclosing both the existence of and the Bank's compliance with the Subpoena. JA 40. Chemical complied with the Court ordered Subpoena, which was the product of judicial scrutiny and, as held by the District Court, was in all respects regular and proper on its face. A-49. Accordingly, even if the Privacy Act applied to the disclosures made in this case (which it does not), petitioners would fail to state a claim for relief. JA 16.

Chemical's production of information pursuant to a § 1782 Order was expressly exempted from the provisions of the Privacy Act. The Court below wrote:

> It is beyond cavil that 28 U.S.C. § 1782 is a federal statute which required that Chemical disclose the requested financial information. As such, the information provided by Chemical was "required to be reported" and thus not subject to the Privacy Act's strictures. A-37.

Petitioners distort the Court's holding by asserting that it found an "implied exemption" in addition to those expressly enumerated in the Privacy Act. In point of fact, no such "implied exemption" was found, and, to the contrary, the Court held that Chemical's conduct was consistent with the provisions of §3413(d) of the Privacy Act.

Section 3413(d) of the Privacy Act provides:

> **Nothing in [the Privacy Act] shall authorize the withholding of financial records or information required to be reported in accordance with any Federal statute or rule promulgated thereunder.**

Relying on the statements of the sponsor of this bill in the House Report, 1978 U.S. Code Cong. & Admin. News 9356, the District Court concluded that the broad provision of §3413(d) was to be liberally construed, and Chemical's conduct squarely fit within an express exception to the Privacy Act. A 37.

The Circuit Court in *Doe v. United States*, 860 F.2d 40 (2d Cir. 1988), decided "by enacting §1782 'Congress has given the district courts broad discretion in granting judicial assistance to foreign countries . . .' *In Re Request for Assistance*, 848 F.2d 1151, 1154 (11th Cir. 1988). The standard of review for determining whether the district court can exercise . . . its §1782 authority is abuse of discretion."

The Court's compulsion of Chemical's production of financial records pursuant to its § 1782 Order falls within an express exemption to the Privacy Act within the meaning of §3413(d).

Once the Federal District Court ordered Chemical to comply, the Bank was faced with the following options:

1. it could comply;

2. it could do nothing and be in contempt of court; or

3. it could move to quash the Subpoena.

Chemical chose the first option. Any other course of conduct was unfathomable to it. Chemical had no desire to be in contempt of a Court order in every way regular on its face, and, which the District Court has the clear power to issue and to enforce. Discussing §1782, the Court in *Doe v. United States*, 860 F.2d 40 (2d Cir. 1988), made very clear: "The district courts 'from the very nature of their institution, possess the power to fine for contempt, imprison for contumacy, enforce the observance of orders, *etc.*' *Ex Parte Terry*, 128 U.S. 289, 302-03 (1888)."

Petitioners incorrectly claim that the Subpoena should not have been issued pursuant to the Circuit Court's holdings of *Fonseca v. Blumenthal*, 620 F.2d 322 (2d Cir. 1980), and *In re Letters Rogatory Issued by the Director of Inspection of the Government of India*, 385 F.2d 1017 (2d Cir. 1967). Pet. 27. The

Second Circuit Court of Appeals did not agree and "readily distinguished" those cases from the present one. A-38.[4] Indeed, petitioners' argument begs the question with respect to Chemical's conduct. Once the Subpoena was issued Chemical had no choice but to obey it.

Petitioners explain in detail the "sins" of the United States Attorney in requesting the issuance of the Subpoena, one that purportedly did not state in detail the documents sought, and in failing to issue a certificate of compliance to the Bank in accordance with the Privacy Act. None of this establishes a violation of the Privacy Act *by Chemical*. Denton's failure to issue a Privacy Act certificate is irrelevant to establishing liability on Chemical's part. A certificate of compliance may not be issued prior to notification of the customer; however, when, as in this case, customer notification is delayed by court order, the financial institution may not withhold its performance under that order.

Chemical also had no real ability to stand in the shoes of its customers, and in this case non-customers, like Roderick Young, and absorb the expense, burden and risk of litigation to move to quash the Subpoena on petitioners' behalf. No case has ever held that this burden was a legal obligation of the financial institution. Chemical receives more than 2,500 subpoenas a year. JA 278 ¶31. The manpower, time and expense involved in contesting even a fraction of these would raise exorbitantly the cost of production and even more importantly, would tremendously delay Chemical's ability to respond to legitimate requests, which if not complied with in a timely way may have grave repercussions to the administration of justice. The law does not require Chemical to take on this burden, nor do petitioners direct the Court's attention to a single case that implies as much. For policy reasons, if nothing else, this Court should not disturb the holding of the Circuit Court.

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[4] Following *Trinidad and Tobago*, 648 F. Supp. 464 (S.D. Fla. 1986), *aff'd*, 848 F.2d 1151 (11th Cir. 1988), *cert denied*, 109 S.Ct. 784 (1989), the Court of Appeals determined that the Attorney General of Bermuda was an "interested person" within the meaning of § 1782. A-39.

c. Even Without a Subpoena Chemical Would Have Been Free to Make a Voluntary Disclosure in the Bermuda Investigation.

Section 1782(b) of the Assistance to Foreign Tribunals and Litigants Act specifically permits the type of disclosures, which the petitioners mistakenly aver are actionable.[5] That section states:

> (b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

The legislative history of 28 U.S.C. §1782(b) makes clear that Congress adopted this statute in an effort to improve cooperation in international litigation. *See* 1964 U.S. Code Cong. and Adm. News at pp. 3782-3783. Part of that history is especially illustrative of Congressional intent:

> Subsection (b) of proposed revised section 1782 reaffirms the pre-existing freedom of persons within the United States voluntarily to give testimony or statements or produce tangible evidence in connection with foreign or international proceedings or investigations. This explicit reaffirmation is considered desirable to stress in the relations with foreign countries the large degree of freedom existing in this area

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[5] The Youngs admit they have no evidence but rather merely speculation that Chemical was the source of a tip to Bermuda setting off an investigation by the Bermuda Attorney General into their illegal money laundering activities. (JA 276 ¶¶25 and 26). Chemical refused to disclose any information or to make any bank records available to the Bermuda Attorney General (or for that matter to anyone) without a Court order (JA 114-15 ¶3). Contrary to petitioners assertion, there is no evidence in the record that Chemical officer John O'Flaherty had been communicating with Bermuda Attorney General Froomkin other than to decline to release information without a Court order.

> in the United States. It also serves to make clear that subsection (a) leaves that freedom unaffected. *Id.* at 3790.

See also, Letter from Rep. Oscar Cox, Chairman of Commission on International Rules of Judicial Procedure to John McCormack, Speaker of the House (May 28, 1963), reprinted in 1964 U.S. Code Cong. to Admin. News at 3792-94. *See generally, In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151, 1153 (11th Cir. 1988).

Thus, even without a subpoena Chemical would have been free to make a voluntary disclosure in the Bermuda investigation. Petitioners incorrectly allege that Chemical produced witness statements not covered by the Subpoena to Attorney General Froomkin. Pet. 8-9. Indeed, the witness statements were expressly covered by the Deposition Subpoena served on Chemical. JA-39. *Cf., In re Sumar*, 123 F.R.D. 467 (S.D.N.Y. 1988) (Affidavit or sworn statement may be treated as the same as deposition for purposes of letter rogatory request). The fact that the Government of Bermuda preferred to take Chemical's testimony in the form of witness statements — a form expressly authorized by §1782 — rather than orally is a difference without a distinction. Moreover, Chemical actually gave the witness statements directly to the Bermudian officials, and Commissioner Denton did not participate in taking these statements. JA 272 ¶12. Bermuda's Attorney General, not Chemical, provided the witness statements to Commissioner Denton. JA 136-137.[6]

The Circuit Court believed that there existed a real possibility that foreign governments would turn to private commissions for assistance undermining the government's ability to obtain reciprocal cooperation. JA-11. The Court declined to give the

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[6] The record clearly shows that there were no informal discussions between Attorney General Froomkin's representatives other than those compelled by the Subpoena. Pet. 8. Even if there had been, however, such discussions would not be actionable pursuant to the Privacy Act since it regulates only the production of financial information to the United States federal government.

Privacy Act an interpretation that would frustrate another independent objective of Congress, *i.e.*, cooperation in international investigations. *See Lieberman v. Federal Trade Comm'n*, 771 F.2d 32, 40 (2d Cir. 1985). It wrote:

> . . .Congress has long recognized the freedom of individuals to provide information voluntarily for use in foreign proceedings. *See* 28 U.S.C. § 1782(b). The Act reveals Congress' objective of encouraging voluntary cooperation with law enforcement agencies. For example, Congress specifically exempted "tips" to law enforcement authorities by banks that suspect a customer of engaging in criminal activity. 12 U.S.C. § 3403(e). In fact, it felt so strongly about encouraging voluntary cooperation that it subsequently added a provision preempting any other state or federal law to the contrary. *Id.* § 3403(c) (Supp. 1988). In addition, it declined to adopt certain provisions that would have restricted the ability of government authorities to share information acquired under the Act with other agencies. It did so, in part, out of concern that the provisions would also restrict the ability of law enforcement groups to share evidence of criminal activity with foreign governments. *See Hearings on S. 2096 Before the Subcomm. on Financial Institutions, 95th Cong., 2d Sess.*, 235-36 (1978) (Statement of Hon. Harold M. Williams, Chairman of the Securities and Exchange Commission). A 9-10.

Petitioners can point to no legal authority that prohibits Chemical from providing information relative to crimes involving Sybil's accounts at Chemical to law enforcement officials of a foreign government. The freedom to voluntarily give such testimony or produce documents for use in a proceeding in a foreign or international tribunal, which reflects the federal public policy of this country, was left unaffected by subsequent legislation, including the Privacy Act.[7]

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[7] Although the Privacy Act does not apply to this case, it is interesting to note that even §3403 thereof absolves financial institutions from liability to a

(*Footnote continued*)

d. The Lower Courts Correctly Declined to Render An Advisory Opinion Regarding Potential Abuses Of the Privacy Act Since There Were No Facts Adduced In the Record to Reflect An Actual Abuse by Commissioner Denton.

Petitioners complain that the Circuit Court declined to render an advisory opinion since it "did not address the issue of whether the Act nontheless applies when the Government, although seeking or obtaining customer information from a financial institution for a foreign government, also seeks the information for its own purposes, or reserves the right to review and use the information for its own purposes, or actually uses the information for its own purposes." Pet. 11. Petitioners, however, admit:

> [T]he District Court found to be the facts in these cases, [that] the Department [did] not obtain such documents in furtherance of an investigation of its own. . . .[T]herefore, (as the District Court determined) the Government is acting merely as a "conduit" for the receipt and transmission of information and is not acting in furtherance of an investigation of the United States, the Act does not apply. Pet. 10.

The Circuit Court properly did not render an advisory opinion, nor should *certiorari* be granted by this Court to review issues that are not supported by any facts in the record and that are expressly inconsistent with the findings of the District Court. *See, e.g., Golden v. Zwickler*, 394 U.S. 103 (1969) (Federal courts will not render advisory opinions).

Petitioners admit that §1782 does not require the appointment of a federal official to assist a request for judicial intervention by a foreign litigant. It just so happens, that in this case, the District Court appointed an Assistant United States Attorney as Commissioner. Chemical's obligations in responding to the

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customer under any federal or state law or regulation for notification to a United States governmental authority that the institution has information that may be relevant to a possible violation of any statute or regulation.

Commissioner, who functions merely as a conduit of information, does not become enlarged by the happenstance that the Commissioner is also a federal employee. Surely, if the District Court had ordered otherwise, and Chemical produced the exact same information and records leading ultimately to petitioners' convictions to anyone not employed by the federal government, from a New York State prosecutor to the Attorney General of Bermuda, Chemical would not be involved in the present $10,000,000 lawsuit.

Petitioners argue that a holding exempting requests of a foreign government under §1782 from the requirements of the Privacy Act would invite prosecutorial misconduct. Petitioners do not allege, however, that any abuse occurred in this case. In some circumstances, the Privacy Act does not apply to the federal government's own audits and investigations. *Adams v. Board of Governors*, 855 F.2d 1336 (8th Cir. 1988); *Raikos v. Bloomfield State Bank*, 703 F. Supp. 1365 (S.D. Ind. 1989). If an abuse arose in the future, it would be appropriate then to address it by statutory amendment. No other result, however, is indicated on the present record. Since petitioners did not plead and, indeed, cannot show any abuse in this action, in effect, they are requesting an "advisory opinion" in the absence of any actual abuse. Importantly, the uncontradicted affidavits of Mr. Denton establish that he did not use the Bank's records in any federal investigation.[8] Moreover, petitioners fear that hypothetical abuses by the federal government might arise in the future, in contravention of the public policy of the Privacy Act, is not well founded, since petitioners admit that state law enforcement authorities presently are free to act as commissioner without any of the Privacy Act's strictures, and yet the Privacy Act is not intended to curb these potential, but unrealized "abuses".

In reviewing the legislative history of the Privacy Act the Circuit Court concluded that Congress in attempting to strike a balance between unwarranted governmental intrusion without

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[8] The Commissioner's entire file was reviewed by petitioners in the *Young v. United States* action, and no prosecutorial misconduct was discovered or alleged. JA 194 ¶5.

crippling legitimate criminal investigations, exempted from the Privacy Act grand jury subpoenas after it decided that safeguards already in place would adequately protect against abuse. A-8. *See* 12 U.S.C. § 3413(i); H. Rep. at 35, *reprinted* in Code News at 9307; *id.* at 228, reprinted in Code News at 9358. The Circuit Court wrote:

> [W]e believe Congress intended the [Privacy Act] to regulate the release of customer information from financial institutions in circumstances where adequate controls did not already exist. The subpoena served on Chemical, "so-ordered" by a district court, was not in this category because it was subject to judicial review even before it was served. It thus received the same, if not higher, level of scrutiny given grand jury subpoenas. Construing the Act as not to apply in such circumstances would be consistent with congressional intent. A-9.

Further, the Circuit Court found that the impact on the Youngs' privacy interests would have been the same regardless whether the information had been transmitted to Bermuda by a federal employee or a private commissioner. A-11, 12. If Bermuda had chosen a private commissioner, nothing would have prevented it from sending copies of the account information to the Government on its own initiative, which is precisely what happened here with the witness statements obtained by Attorney General Froomkin. A-11.

Petitioners have done a complete review of the entire file maintained by Commissioner Denton and yet have failed to cite any example of an actual abuse of their financial records by the federal government. Moreover, the Circuit Court expressly found that the risk of abuse is "quite low." A-12. It explained that the Government's opportunity for manipulation is limited by the fact that a representative may apply for a commission only upon the request of a foreign party, and then only when the requesting party can adequately establish that the evidence sought will be used in a foreign tribunal.

The absence of even a single case imposing liability against a financial institution for complying with a Court order under similar circumstances is strong evidence that no cause of action exists, and *certiorari* should not be granted. Nevertheless, petitioners appear to argue that Chemical should be held liable because Commissioner Denton allegedly did not act properly. Unfortunately, petitioners do not supply the Court with any reference in the record to support this claim. Instead, grasping at straws, they point out that Mr. Denton (1) made an *ex parte* application; (2) retained copies of the records which according to Judge Stewart's order were "to be retained by the . . . Department . . . for such use as the Attorney General [of Bermuda] or his designated representatives may deem appropriate" (JA-128); and (3) wrote letters to Bermuda on Departmental letterhead. From these facts, petitioners conclude that Denton had a prosecutorial interest in the documents. Actually, no such conclusion is appropriate. Moreover, it was expressly rejected by both the District and Circuit Courts. A-48 - 49, and A-15. The District Court pointedly wrote:

> As this Court has determined that the Commissioners in this case acted properly . . ., it would be absurd to hold that Chemical disclosed Sybil Young's records in violation of the Privacy Act. A-49.

Commissioner Denton took no part in the actual investigation of the Youngs; the investigation was directly handled by the Office of the Attorney General of Bermuda. Denton did not appear at the interviews of bank personnel pursuant to which bank records were identified and information adduced in connection with Bermuda's investigation into the Youngs' criminal activities. The District Court found and the Second Circuit Court of Appeals expressly agreed that Denton was a mere "conduit" for information to the foreign tribunal. A-7 and A-33.

Petitioners mischaracterize the second decretal paragraph of the Order appointing Mr. Denton a commissioner. That order provided in part:

> that the testimony or other evidence in accordance with this Order are to be retained by the United States Department of Justice for such use as the Attorney General or his designated representatives may deem appropriate.

Petitioners assert that the Court ordered that the United States Department of Justice should retain the evidence adduced through the Commission for such use as the [United States] Attorney General should deem appropriate. Pet. 8. Petitioners' strained reading of this paragraph is completely at odds with its plain meaning and their interpretation was not the one afforded the Order by the Commissioner. The Court actually ordered that the United States Department of Justice should retain the evidence adduced by the Commission for such use as the Attorney General *of Bermuda* or his designated representative may deem appropriate. In both the application and the subsequent order the Attorney General of Bermuda is referred to as the "Attorney General." Nowhere in any Court record concerning the Youngs is the Attorney General of the United States ever mentioned. The Department of Justice consistently is described as the Department and is never referred to as the Attorney General. Copies of the documents were to be retained by the Commissioner for the totally proper circumstance, where for example, the originals might be lost in transit or they had to be reauthenticated by witnesses, *etc.*

Moreover, petitioners do not explain why it is Chemical's responsibility to ensure — much less prevent — Commissioner Denton from retaining copies of Chemical's records in his files or how the Commissioner's retention of a duplicate set of documents could possibly cause a violation of the Privacy Act by Chemical.

Not only is petitioners' claim that the Commissioner acted improperly without foundation, even if it were true, it would not state a cause of action against Chemical or established why *certiorari* should be granted in the *Chemical* action.

II

RODERICK YOUNG LACKS STANDING TO SUE CHEMICAL PURSUANT TO THE PRIVACY ACT BECAUSE HE IS NOT AN AUTHORIZED REPRESENTATIVE OF ANY CHEMICAL ACCOUNT

The District Court (affirmed by the Court of Appeals) correctly held that the second cause of action averring Roderick Young's claim under the Privacy Act also fails to state a cause of action because he is not a customer or authorized representative of any account of Chemical. A 52.

The Privacy Act defines "customer" as "any person or authorized representative of that person who utilized or is utilizing any service of a financial institution . . . in relation to an account maintained in the persons name." Privacy Act §3405. Roderick has no account or relationship with Chemical. A 52. Sybil admits in her affidavit in opposition to Chemical's motion that Chemical did not authorize Roderick to transact banking business with it, and, in fact, rejected his two aborted attempts unauthorizedly to act as Sybil's messenger. JA 89-90. Indeed, she describes Chemical's refusal to accept deposits from Roderick as turning into an "imbroglio." JA 260 ¶6. Chemical never permitted Roderick to act on Sybil's behalf; she filed no authorization or power-of-attorney or any instruction claiming to invest him with this authority, and none exists in any Bank record. A 52.

Roderick is not an "authorized" representative. See for example, the Sectional Analysis and Explanation of the Department of Justice cited below with approval by petitioners, which explains:

> "customer" in turn, is a person who uses a service of an office of a financial institution, or for whom the institution acts as a fiduciary, but only in relation to an account maintained in the person's name. *The definitions of "financial records" and customer", taken together, are intended to preclude application of the bill to anyone other than the person whose account*

> *information the government seeks access*. They would exclude, for example, the endorsers of checks and guarantors of loans. [Emphasis added.]

A-52.

Although Sybil argued to the Court below that Roderick was her agent, in fact, he was not. Carried to its logical conclusion, under such implied agency theory Roderick would have been entitled to write checks on Sybil's account even though he had no signing authority, cancel lines of credit, take out loans obliging Sybil to repay, open letters of credit on her behalf and take any other action which occurred to him with respect to her account at Chemical, all without the necessity that Sybil take the simple expedient of notifying the Bank. Using petitioners' rationale, Sybil would be liable personally for all Roderick's acts because she had a silent, unexpressed and secret intention to make him her representative. Moreover, Chemical would be liable for breach of contract if it refused to follow the instructions of this stranger because Sybil *sub silentio* without notice to Chemical had made him her representative. This is incorrect, and the petitioners offer no authority to support this view.

The Court in *Ridgeley v. Merchants State Bank*, 699 F. Supp. 100 (N.D. Tex. 1988), dismissed plaintiff's claim for failure to state a cause of action because plaintiff, although a "representative" of customers and a signatory on the relevant checking account, was not a "customer" within the meaning of the Privacy Act. The *Ridgely* Court relied on the Supreme Court's ruling in *Securities and Exchange Commission v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 745 (1984). The most salient feature of the Privacy Act is the narrow scope of the entitlements it creates. *Id. Ridgeley*. It carefully limits the kinds of customers to whom it applies. *Id. O'Brien*. In the case at bar, Roderick Young was not even an authorized signatory on Sybil's account at Chemical.

Thus, since Roderick Young is not a customer, and Chemical never turned over any information relevant to him, he lacks standing to sue under the Privacy Act. The lower courts correctly held that he failed to state any claim for which relief may be granted, and the complaint properly was dismissed as to him.

CONCLUSION

For the foregoing reasons, Chemical Bank respectfully requests that a *writ of certiorari* not be granted.

New York, New York
December 21, 1989

Respectfully submitted,

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(3)

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In the Supreme Court of the United States

OCTOBER TERM, 1989

SYBIL YOUNG AND RODERICK YOUNG, PETITIONERS

v.

UNITED STATES DEPARTMENT OF JUSTICE AND CHEMICAL BANK, N.A.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Right to Financial Privacy Act, 12 U.S.C. 3401 *et seq.*, which requires that agencies and departments of the United States adhere to certain procedural requirements when obtaining bank account records, is applicable to an Assistant United States Attorney who, at the behest of a foreign government, is appointed by a federal district court as a judicial commissioner under 28 U.S.C. 1782(a) for the sole purpose of assisting a foreign government's investigation and prosecution of violations of foreign criminal law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A27) is reported at 882 F.2d 633. The opinions of the district court (Pet. App. A28-A40, A42-A55) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A57-A58) was entered on August 8, 1989. A petition for rehearing was denied on August 30, 1989 (Pet. App. A59-A60). The petition for a writ of certiorari was filed on November 27, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners contend that the Department of Justice and Chemical Bank violated the Right to Financial Privacy Act,

12 U.S.C. 3401 *et seq.*, in the course of transmitting financial records and other information on petitioners' bank accounts to the government of Bermuda.

1. The case arises out of Bermuda's investigation and criminal prosecution of petitioners for violations of Bermudian currency control laws. On November 14, 1986, the Attorney General of Bermuda sent an international request for judicial assistance to the office of the United States Attorney for the Southern District of New York (C.A. App. A24-A25). The request alleged that petitioners had transferred significant sums of money to Chemical Bank, in violation of Bermudian Exchange Control regulations (C.A. App. A24). The Attorney General of Bermuda accordingly requested the assistance of the U.S. Attorney's office in obtaining copies of petitioners' bank account records and pertinent statements from bank officers or employees (C.A. App. A24). He further stated that all information would be used solely for investigation and prosecution of the alleged offenses (C.A. App. A25).

On January 27, 1987, Assistant United States Attorney David W. Denton applied to the United States District Court for the Southern District of New York for an order appointing him a commissioner under 28 U.S.C. 1782 "for the purpose of taking testimony and obtaining evidence in accordance with a request for international judicial assistance issued by the Attorney General of Bermuda" (C.A. App. A27). The application appended the Bermudian Attorney General's request and stated that testimony and evidence secured by the commissioner would "be certified and transmitted to the requesting party through appropriate channels" (C.A. App. A28).

On January 28, 1987, the district court issued an order appointing AUSA Denton a commissioner under 28 U.S.C. 1782(a). The order, which had been drafted and submitted for approval by the AUSA, authorized the commissioner

to issue subpoenas, to obtain evidence in conformance with the request for assistance, and to submit all evidence obtained to the government of Bermuda (C.A. App. A32). The court also directed that its order and supporting application be sealed and that evidence obtained by the commissioner be retained by the United States Department of Justice for such use as the Attorney General or his designated representatives may deem appropriate (C.A. App. A32-A33).

Shortly thereafter, AUSA Denton, citing his authority as a commissioner, requested that the court approve a subpoena commanding Chemical Bank to produce all records pertaining to petitioners' accounts (C.A. App. A34-A36). Denton also requested that the court, pursuant to 12 U.S.C. 3409, (1) order Chemical Bank not to disclose the existence of the subpoena or the bank's compliance with the subpoena and (2) authorize the government to delay notifying petitioners of the subpoena for ninety days (C.A. App. A35-A37). In support of this request, Denton advised the court that disclosure of the subpoena could prevent meaningful investigation of the alleged violations of Bermudian law. In particular, he noted that the Bermudian Attorney General had indicated that notifying petitioners would risk removal or destruction of evidence, intimidation of witnesses, and petitioners' flight from prosecution (C.A. App. A34-A35). On January 30, 1987, the court issued an order delaying notification of petitioners and barring Chemical Bank from disclosing any information pertaining to the subpoena (C.A. App. A37).

The commissioner subsequently transmitted to the Bermudian authorities records and affidavits pertaining to petitioners' bank accounts (C.A. App. A21-A22). Based on the information provided by Chemical Bank, Bermudian authorities charged petitioners with 47 counts of violating Bermuda's criminal laws: 22 counts of making a false state-

ment for the purpose of buying foreign currency; 14 counts of illegally exporting foreign currency notes; and 11 counts of illegally exporting travelers checks (C.A. App. A12-A16). On August 25, 1987, petitioner Sybil Young pleaded guilty to 46 counts of the indictment, and petitioner Roderick Young pleaded guilty to 45 counts (C.A. App. A12-A16). The Youngs received consecutive sentences of up to two years in prison on each count or, in the alternative, fines on each count that added up to $775,000 (for Sybil Young) and $184,500 (for Roderick Young) (C.A. App. A15-A16).

2. Following their criminal convictions in Bermuda, petitioners filed separate suits under the Right to Financial Privacy Act against Chemical Bank (88-6314 C.A. App. A25-A31) and the Department of Justice (C.A. App. A3-A7). In the suit against Chemical Bank, petitioners alleged that the bank had released customer records in a manner that violated 12 U.S.C. 3403 (88-6314 C.A. App. A27).[1] In the suit against the Department of Justice, petitioners alleged that the Department obtained and disclosed bank account information in violation of 12 U.S.C. 3402 (C.A. App. A5). Petitioners demanded compensatory and punitive damages against both Chemical Bank and the Department (C.A. App. A6).

The district court, in separate opinions and judgments, dismissed each complaint for failure to state a claim upon which relief could be granted (Pet. App. A41, A56). The district court held that the statute did not apply to the

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[1] Petitioners also alleged that Chemical Bank, in violation of state law, had breached certain implied contractual provisions barring disclosure of account information and that the Bank's disclosures constituted a tortious intrusion on their right to privacy (88-6314 C.A. App. A28-A29). The district court dismissed these state law claims (Pet. App. A52-A55). The court of appeals modified that aspect of the judgment to provide that these claims would be dismissed without prejudice, with leave to refile in New York state court (Pet. App. A27).

United States Attorney's Office when it acts as a commissioner under 28 U.S.C. 1782 and procures financial information for use in a foreign proceeding (Pet. App. A34-A35, A49). First, the court reasoned that the commissioner merely acts as a conduit of information to the foreign tribunal and it is therefore the foreign tribunal that has "access to" or "obtains" financial records within the meaning of the Right to Financial Privacy Act. Second, the court reasoned that neither the district court itself nor a commissioner acting with powers conferred by the court is a "Government authority" for purposes of those statutory provisions regulating access by a "Government authority" to bank records (Pet. App. A36-A37). Finally, the district court held that disclosures made under 28 U.S.C. 1782(a) are exempted from the statute's coverage by 12 U.S.C. 3413(d), which states that the Right to Financial Privacy Act does not authorize the withholding of financial records that must be reported in accordance with federal law (Pet. App. A37).

3. The court of appeals affirmed. In a single opinion and judgment disposing of both district court cases, the court of appeals held that the Right to Financial Privacy Act does not apply to court-appointed commissioners when they seek information from financial institutions with court-ordered subpoenas (Pet. App. A13). First, the Court reasoned that the Act was principally intended to regulate the release of information in circumstances where, unlike here, adequate, alternative controls were absent. In this case, the commissioner's subpoena had been reviewed and approved by the district court before it was served on the bank (Pet. App. A9).

Second, the court reasoned that a contrary interpretation would frustrate the objectives of 28 U.S.C. 1782(a) by constraining the government's ability to assist foreign governments in obtaining information, thereby undermining our

government's ability to obtain reciprocal assistance abroad (Pet. App. A10-A11).

Third, the court found that subjecting a governmental commissioner's actions to the Act would not afford bank customers any additional protections. In this regard, the Court noted that the Bermudian government could have obtained the same information in the same way without conforming to the Act simply by requesting that a private individual seek appointment as commissioner (Pet. App. A11).

Fourth, the court found that exempting governmental commissioners from the Act would not increase the potential for governmental abuse in improperly obtaining bank records under the guise of acting as a court-appointed commissioner. The court explained that the governmental officers could obtain appointment only at the request of a foreign government (Pet. App. A12). The court further explained that any putative risks posed by the government's retention of files obtained through a commissioner's activities could easily be minimized by an appropriate district court order directing the commissioner to place any retained records under seal (Pet. App. A12 n.7).

Finally, the court held that the government was not estopped from denying that the Act applied in light of its prior request that the district court, under authority of 12 U.S.C. 3409 of the statute, order the bank not to disclose the existence of the subpoena.[2] The court noted that

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[2] Petitioners mistakenly assert (Pet. 7 n.4) that the court of appeals reserved the question of whether a bank can be restrained from notifying its customer under 12 U.S.C. 3409, finding that this question was "not a trivial one." In fact, the court of appeals in the cited passage reserved the entirely different question of whether a "court would have had the power, *absent the provision in the [Right to Financial Privacy Act]*," to issue a delayed-notification order (Pet. App. A16 (emphasis added)). We observe that 28 U.S.C. 1782 may well provide implicit

the government had not intended to mislead the court, that the question of the Act's applicability was not settled at the time the records were sought, and that the Bank had indicated it believed the Act applied to the commissioner's request (Pet. App. A15). The court therefore held that estoppel would not lie on the facts of this case.

ARGUMENT

The decision below does not conflict with any decision of this Court or of another court of appeals. It correctly holds that the Right to Financial Privacy Act, 12 U.S.C. 3401 *et seq.*, does not create a cause of action for damages against the United States Attorney's Office when it acts as commissioner under 28 U.S.C. 1782 and procures financial information for use in a foreign proceeding. Further review by this Court is therefore unwarranted.

1. Petitioners err in asserting (Pet. 13-14) that the decision below conflicts with *In re Request For Assistance From the Ministry Of Legal Affairs Of Trinidad & Tobago*, 848 F.2d 1151 (11th Cir. 1988), cert. denied, 109 S. Ct. 784 (1989). In that case, a district court denied the motion of a bank customer to quash a subpoena the court had issued pursuant to a request for legal assistance from a foreign government. As in this case, the request had been transmitted through the Department of Justice.

The Eleventh Circuit affirmed the district court's decision. In a footnote in its opinion, the court noted that "[t]he records will be released in conformance with the Right to Financial Privacy Act." 848 F.2d at 1156 n.12. The court's statement is unaccompanied by analysis or explanation and appears simply to recite the commissioner's stated intention

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authority to a court to take reasonable steps, including issuance of a delayed-notice order, to comply with a foreign request for assistance in situations in which 12 U.S.C. 3409 would provide such authority in a domestic case.

in that case. Nothing in the court's brief statement suggests that the Eleventh Circuit has reached a decision on the question whether a commissioner acting pursuant to 28 U.S.C. 1782 *must* meet the requirements of the Financial Privacy Act. Petitioners therefore err in asserting that Eleventh Circuit precedent conflicts with the Second Circuit's decision here.[3]

Indeed, the decision below is the only appellate decision to reach a holding on whether the Right to Financial Privacy Act applies to the Department of Justice when the Department, under the authority of 28 U.S.C. 1782, seeks to aid a foreign government in the investigation of violations of foreign criminal statutes. The questions presented by petitioners have not been explored or developed by *any* other court of appeals. There is thus no conflict in the lower courts, and review by this Court of the questions presented would be unnecessary and premature.

2. The Right to Financial Privacy Act does not create a cause of action for damages against the Department of Justice when an employee of the Department, acting under authority of 28 U.S.C. 1782(a), aids a foreign government in obtaining bank records for use in the foreign government's investigation and prosecution of violations of foreign criminal statutes.

a. First, the Right to Financial Privacy Act does not apply in this case because the statute excludes from its coverage those who, like Commissioner Denton, act as agents of the judicial branch. The key statute on which

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[3] Petitioners also suggest (Pet. 13) that the decision below is inconsistent with the district court's decision in *In re Request For International Judicial Assistance (Letter Rogatory) From The Federal Republic of Brazil*, 700 F. Supp. 723 (S.D.N.Y. 1988). That decision, however, was rendered by a district court within the Second Circuit and, insofar as it is inconsistent with the Second Circuit's decision, is no longer authoritative.

petitioners rely provides that, absent the customer's written consent, "no *Government authority* may have access to or obtain copies of, or the information contained in the financial records of any customer from a financial institution" unless the requirements of the Act are met. 12 U.S.C. 3402 (emphasis added). A "Government authority" is in turn defined as "any agency or department *of the United States*, or any officer, employee, or agent thereof," 12 U.S.C. 3401(3) (emphasis added)—a definition that excludes agents or officers of the courts, see *Doe* v. *Board on Professional Responsibility of the District of Columbia Court of Appeals*, 717 F.2d 1424, 1427 (D.C. Cir. 1983). Because a commissioner acts as an officer of the court—not as an employee or agent of a federal agency or department—he is not a "Government authority" within the meaning of the Act.

The commissioner's function as an agent of the court is made clear from the duties entrusted to him by 28 U.S.C. 1782(a). That statute provides that, in furtherance of the district court's authority to order a person within its district to give testimony or produce evidence for use in a proceeding before a foreign or international tribunal, the court:

> may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement.

The decision to appoint a commissioner is committed by statute to the sound discretion of the district court. See, *e.g.*, *In re Request For Judicial Assistance from Seoul District Criminal Court*, 555 F.2d 720, 724 (9th Cir. 1977); *In re Request For Assistance From the Ministry Of Legal Affairs Of Trinidad & Tobago*, 848 F.2d at 1154; S. Rep. No. 1580, 88th Cong., 2d Sess. 7 (1964). The duty of the commis-

sioner is to facilitate the *court*'s power under 28 U.S.C. 1782(a) to order the production of testimony or other evidence for use in a foreign judicial proceeding. See generally Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1026-1027 (1965). Once appointed, he derives his power and authority from a judicial appointment, not from any office or employment with the United States. Therefore, as with a special master—whose duties in many respects may parallel those of a commissioner—the fact that a commissioner may hold other employment does not affect his status as an officer of the court when discharging the duties of his appointment.

b. Second, the Right to Financial Privacy Act does not create a cause of action against the government in cases arising out of the appointment of government employees as commissioners because the foreign government—not the government of the United States—has "access to" or "obtains" the documents or information at issue in such a case. Even when he also holds an office with the Department of Justice, a commissioner under the Act is merely a conduit of information to the requesting foreign government or international tribunal.

Every incident of a commissioner's authority and powers reflects the fact that it is the foreign tribunal that obtains and has access to the financial records in question, not a United States "Government authority" as defined by 12 U.S.C. 3401(3). As the court of appeals observed (Pet. App. A12), a government employee can apply for a commission only upon the request of a foreign party, and then only when the requesting party can establish to the court's satisfaction that the evidence sought will be used in a foreign or international tribunal. Moreover, in determining whether to grant an application for appointment as commissioner, a district court is expected to take into account such matters as the nature and attitudes of the requesting government

and the character of the proceedings in the foreign country. S. Rep. No. 1580, *supra*, at 7. Consistent with the purpose of aiding a foreign investigation, an Assistant United States Attorney, if requesting appointment as a commissioner, may also seek to have foreign judges or police officials appointed as co-commissioners, thereby permitting the court's judicial authority to be coupled to the powers of the foreign or international tribunal requesting assistance. See S. Rep. No. 1580, *supra*, at 8; see also United States Attorneys' Manual § 9-13.540 (Oct. 1988). Costs of executing requests for international judicial assistance are accordingly the responsibility of the foreign country, unless otherwise provided by treaty. *Ibid.*

c. Finally, as the district court held, disclosures made under 28 U.S.C. 1782(a) are exempted from the statute's coverage by 12 U.S.C. 3413(d), which provides that the Right to Financial Privacy Act does not authorize the withholding of financial records that must be reported in accordance with federal law (Pet. App. A37). This provision provides a safe harbor for entities—in the present case, Chemical Bank and the Department—that are under compulsion to make disclosures that would otherwise be covered by the Act.[4]

3. As the court of appeals recognized, Congress had good reason to limit the coverage of the Right to Financial Privacy Act in ways that excluded commissioners appointed

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[4] There is a fundamental difference between administrative subpoenas covered by the Act, and subpoenas issued pursuant to 28 U.S.C. 1782, which come within the exclusion of 12 U.S.C. 3413(d). While issuance of an administrative subpoena is within the discretion of the administrative agency and is therefore never "required" of the agency, issuance of an order appointing a commissioner under 28 U.S.C. 1782(a) is not within the discretion of an administrative agency, but rather is committed to the discretion of the court. Once the order is issued, a federal agency is required to obey it.

pursuant to 28 U.S.C. 1782. In enacting 28 U.S.C. 1782 and reaffirming the courts' power to render international judicial assistance, Congress intended to stimulate reciprocal cooperation from foreign governments in instances where United States law enforcement efforts require the assistance of a foreign judicial tribunal. *John Deere Ltd.* v. *Sperry Corp.*, 754 F.2d 132, 135 (3d Cir. 1985). While any individual, including a private attorney, can act on behalf of a foreign government and petition the district court for judicial assistance under 28 U.S.C. 1782, the likelihood of fostering reciprocal assistance abroad is obviously greater when such assistance is rendered by the government law enforcement officials who are likely to require the cooperation of foreign governments in the future. The record in this case makes it plain that the Attorney General of Bermuda contacted the United States Attorney's Office for assistance precisely because Bermuda gave analogous United States requests for assistance the highest priority and expected that its own request for assistance would be given equivalent and reciprocal treatment (see C.A. App. A26). In applying for a commission to assist this Bermudian investigation, AUSA Denton was acting to preserve this reciprocal cooperation between the United States and Bermuda. Cf. *United States* v. *Stuart*, 109 S. Ct. 1183 (1989).

4. Petitioners maintain that Commissioner Denton was, on the particular facts of this case, not merely aiding a foreign investigation but also acting in furtherance of the law enforcement interests of the United States (Pet. 21). In support of this assertion, petitioners cite the court's order permitting the Department of Justice to retain copies of the records for such use as the Attorney General or his designated representative may deem appropriate (*ibid.*).[5]

[5] The record shows that there is a very real danger in failing to maintain copies of materials obtained by the commissioner, as some correspondence pertaining to the Bermudian government's request for

There is, however, nothing in the record that supports the bald assertion that AUSA Denton used the office of commissioner to further a United States law enforcement investigation into petitioners' activities. Denton's application stated that he requested appointment as commissioner for the purpose of aiding a request for international judicial assistance issued by the government of Bermuda (C.A. App. A27). He averred that the copies retained by the Department of Justice had not been used for any other purpose (C.A. App. A22-A23). The district court found that assertion to be true (Pet. App. A40). The facts of this case thus do not present any question concerning domestic use of material obtained by a commissioner.[6]

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international judicial assistance was in fact delayed or misdirected in the mails. See C.A. App. A18-A19.

[6] Petitioners also claim (Pet. 27) that the Department knew or should have known that 28 U.S.C. 1782(a) was not available in this case because the assistance was sought for use in a "preliminary investigation" of a criminal matter. This question was not addressed or passed upon by the court of appeals or the district court, and is thus not before the Court on this petition. In any event, however, the information in this case was sought as part of, and ultimately used in, a criminal prosecution before an impartial judge (C.A. App. A13). See *In re Request For Assistance From Ministry Of Legal Affairs Of Trinidad & Tobago*, 848 F.2d 1151, 1154-1155 (11th Cir. 1988), cert. denied, 109 S.Ct. 784 (1989). This case was thus not controlled by the cases cited by petitioners, *Fonseca* v. *Blumenthal*, 620 F.2d 322 (2d Cir. 1980), and *In re Letters Rogatory Issued by the Director of Inspection of the Government of India*, 385 F.2d 1017 (2d Cir. 1967), in which the information was sought solely for the use of a government official who could not be characterized as an impartial adjudicator, or "tribunal."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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